81-2255
No.

Office - Supreme Court, U.S.
FILED
JUN 1 1982
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1981

CHECKRITE PETROLEUM INC.,

Petitioner,

vs.

AMOCO OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. Is the ultimate criteria, *the congressional intent* or shall a literal reading of specified words in the PMPA, be the deciding factor in the construction and interpretation of the PMPA and its application to the case at bar and all future cases involving the PMPA? This was a case of first impression in both the district and circuit court, and now this Court.

There being no conflict between the legislative history and the district court's construction, does this not require that the congressional intent, rather than a strict literal construction prevail?

Petitioner asserts the former position.

II. Shall the criteria for construction of the PMPA be that of the circuit court, in this case, or that of the same circuit court in *Central Hanover Bank & Trust Co. v. Commr. of Internal Revenue,* 159 F.2d 167, 169, *cert. denied,* 331 U.S. 836 — the two opinions being in apparent conflict?

Petitioner asserts the latter position.

III. Is PMPA a statutory codification of an equitable principle, and should an equitable interpretation follow?

The PMPA is not derogatory of the common law and does not require a strict construction. Petitioner asserts the affirmative.

IV. Has the circuit court failed to fully take into account petitioner's true position (the facts not being controverted) in the marketing of petroleum products and the interdependent tri-party arrangement in such marketing involving respondent, the dealers and petitioner?

And was petitioner's function (rather than how he was named by respondent), which was found to be akin to that of a distributor and a jobber, taken into account by the circuit court?

Petitioner asserts that it has not, and had it done so, it should have affirmed the district court's judgment.

PARTIES BELOW

The list of the parties to the proceedings in the court whose judgment is sought to be reviewed is as per the caption in this petition.

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No.

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October Term, 1981

CHECKRITE PETROLEUM, INC.,

Petitioner,

vs.

AMOCO OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Checkrite Petroleum, Inc. prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit, entered in these proceedings on April 1, 1982, reversing the opinion and judgment of the district court.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Second Circuit and the United States District Court, Southern District of New York are reproduced in the appendix, *infra.*

JURISDICTION

The judgment sought to be reviewed was entered on April 1, 1982.

The statutory provision conferring jurisdiction to entertain this writ of certiorari and/or to review the judgment is 28 U.S.C.A. §1254.

The original action was instituted in the United States District Court for the Southern District of New York pursuant to and under the Petroleum Marketing Practices Act, 15 U.S.C. §2801, *et. seq.*

STATUTE INVOLVED

The statute involved in this case is the Petroleum Marketing Practices Act, 15 U.S.C. §2801, *et seq.* and same appears, verbatim, in the appendix at pages 49a-75a.

STATEMENT OF THE CASE

A concise statement of the case and facts material to a consideration of the questions presented is herewith set forth.

No federal questions were raised nor need review.

The facts are in the main not contested, and the review does not seek a review of or the preponderance of questions of facts.

In consideration of petitioner dedicating gasoline service station sites already ongoing and fully equipped stations for the exclusive sale of Amoco fuel, Amoco agreed to pay certain commissions to petitioner. This was pursuant to written contract for a term of years.

The necessary precedents were that petitioner either own, have the dominant lease for a number of years to the gas station site, or in some cases from the dealer at the site a supply agreement requiring the dealer to purchase a brand of fuel nominated by the petitioner. As part thereof there usually were leases or subleases to the site for a period of years by petitioners to the dealers.

Having made the economic investment and risks, petitioner was in a position to, could and did, by contract with respondent, agree to nominate Amoco brand fuel to his dealers and have the dealers enter into dealer-equipment agreements with respondent, as required by respondent.

This agreement (a renewal of a previous one) had a provision concerning renegotiations and renewal of the contract. The agreement expired May 31, 1981.

Under the respondent's agreement with the dealers (dealer-equipment), respondent delivered the fuel to the dealer and was paid by the dealer. Petitioner received a fixed commission on fuel sold and paid for. The true relationship of petitioner and respondent is hereafter discussed.

However, as an inducement for a supply agreement, petitioner agreed to share a portion of its commissions with dealers. This became a material economic factor to a dealer. It was Amoco's policy to pay no commissions to dealers.

The agreement between *respondent and the petitioner* reads:

> "17. It is mutually agreed between the parties that the Amoco-Dealer Sales Agreements cited in ¶1 hereof, shall contain the following clause:-

> 'This agreement shall terminate automatically in the event that the agreement of March 31, 1976 between Amoco and Checkrite Petroleum Corp. as same may be extended or modified, is terminated for any reason.' "

The above clause actually became a part of the dealer-equipment agreement between Amoco and the dealers.

The petitioner's contract with respondent also prohibited petitioner from self-operating any station and a breach results in the loss of commissions.

Respondent refused to renegotiate a renewal or to renew the contract. Instead it sent a letter stating that it "decided that it does not wish to extend, renew or enter into a new agreement" after the expiration of the last agreement.

This PMPA proceeding was instituted for PMPA protection against the non-renewal and termination by respondent.

The exact relationship between petitioner and a given dealer was subject to change, and in the five years preceding the termination, there were changes in the fee ownership, and in the *dominant* lease position, etc. of petitioner. Changes back to the original situations, in the future, are part and parcel of the business engaged in by petitioner. In fact, respondents pre termination intent by refusing to consider new stations to be added which petitioner owned or could acquire, in part resulted in petitioner not owning station sites in fee at termination (165a, 181a-188a).

At the time of this proceeding, petitioner held some leases but in all cases had effective and unexpired supply agreements enabling it to nominate the brand gas to be sold, and the district

court held that "the power to demand that the station operators cease using Amoco products and to change the colors of their stations to another brand gives Checkrite a power which in law and economic theory is generally held by the station operator or dealer himself."

The circuit court's decision gave no consideration to petitioner's economic stake or continuing liability on any leases. The decision likewise ignored petitioner's rights under the supply agreements.

At the hearing in the district court, in commenting on Amoco's offer to the dealers, the court found:

> "Amoco's offer in this case to release these operators from their contracts with Amoco, would, if accepted, effectively terminate the franchise relationship between Amoco and the operators, and would be accomplished by Amoco without compliance with the P.M.P.A."

Later, Amoco, veered from a release to an acknowledgment that it has an obligation to the dealers. This, in turn caused the circuit court to remark (we think, unfortunately) "The dealers are threatened only by Checkrite. That Checkrite might take action detrimental to dealers certainly does not provide Checkrite with rights against Amoco under the P.M.P.A."

The statement, we submit, failed to recognize the economic dilemma in which the circuit court's holding placed petitioner, nor the full portent of the tri-party agreement, and that Amoco now could be left with all the exclusivity rights at the sites with no corresponding obligation.

In times of shortages, a situation in existence only two years ago, and which may return at any time, what good is a right under the supply agreement by petitioner to name another brand, when no gas is available to it, to nominate.

Nor would the right to nominate a no-brand gas which would also be *in short* supply, and which in turn would disenfranchise the dealer, the PMPA not being applicable to non-trademarked gas!

The structure of the petroleum retail system is that all the branded companies tend to form a cluster at nearly all large geographic centers in the city and Long Island where most gas is sold. Thus, the possibility of obtaining a supply of gas from a competing brand is nil, in that it is already represented in that geographic center.

The "good will" from the sales of a particular brand for years will be destroyed by a changeover.

The problem is made less soluble by the fact that major oil companies are not taking on new dealers and that "shortage" of supply, now or in the future does not bode for any success in obtaining an alternate supply.

Lastly, the circuit court, mistakenly took Amoco's acknowledgment that it would recognize the affected dealer's PMPA rights.

At the outset, as aforesaid, if petitioner is neither protected by PMPA nor has a burden of compliance therewith, it has no alternative but to nominate another gas, even a no-brand gas, to capitalize on its economic investment.

Did the PMPA intend to put the dealer in this jeopardy? We urge that the answer is NO, even if it were "equitable" to take away petitioner's property rights, which it was not.

And, suppose Amoco did in fact acknowledge the PMPA rights *of the dealers in this proceeding*, what about dealers similarly situated throughout the U.S.A.? What protection do they have in a situation similar to the one in this case? It should be recalled that the Amoco-Dealer agreements contained a proviso that the termination of the agreement with the "broker" terminates the agreement with the dealer as well.

Thus, the district court found — "that the inevitable practical effect of the termination by Amoco of its agreement with Checkrite will be the termination at the instance of Checkrite of the franchise relationship between Amoco and its operators."

Our PMPA proceeding claimed a termination of our agreement without a claim of a "just cause" for doing so, plus a termination notice that did not comply with the PMPA.

Amoco's defense admitted no just cause for termination and that its termination notice did not comply with the PMPA. Its position was that the word "brokers" is not used in the PMPA and that "broker" is akin to a person bringing two persons together for a commission and that petitioner was not one who ever had title to the fuel, hence it had no application to petitioner.

The district court rejected Amoco's position by a recital of the realistic and factual role played by petitioner in the distribution of petroleum and in the tri-party relationship already set forth at the outset of this statement of the case and facts.

It further found that:

1. "[T]he purpose Congress sought to serve in enacting PMPA would be served more fully if the definition of franchise under the PMPA were read to include persons or companies such as Checkrite, *who possess a significant part of the bundle of economic rights or powers characteristic of a 'franchise' marketing brand name motor fuel.*" (Emphasis added.)

2. The legislative history (referring to S. Rep. No. 95-731, 95th Cong. 2nd Sess. 30, reprinted in U.S. Code Cong & Ad. News, 873 *et seq.*, as well as 123 Cong. Rec. ____, H3013 *et seq.*, April 5, 1977 all of which appear in Judge Brieant's opinion of June 15, 1981) supports petitioner's contention in that though it

> "'does not *actually* sell, purchase or receive motor fuel, Congress did intend that the PMPA would accord broad protection to persons marketing branded fuels."

The word *actually* was thereafter elaborated upon (Section 5, below).

3. Petitioner was an independent entrepreneur, and cited from the House Committee's use of the phrase "independent entrepreneurs" involved in the distribution process and its desire that they be included as distributors.

4. The contracts among Amoco, Checkrite and the station operators clearly set forth *an agreement for the joint marketing by these companies,* or individuals, of branded fuel.

5. That, based on Rep. Dingell's remarks (123 Cong. Rec. ____, H. 3013 *et seq.*, April 5, 1977) and previous findings, the district court found:

". . .in enacting PMPA, Congress did not intend to protect only those persons who literally take formal title to or consignment of motor fuel, but all those independent entrepreneurs who market branded motor fuel on behalf of oil companies."

6. Said the district court:

"[F]or various reasons, the business relationships by which any product, including motor fuel, is brought to market will comprise infinite variations in the legal forms used. Labeling an independent entrepreneur as a 'broker' particularly when the labeling takes place in a contract drawn by the opposite party, does not make the independent entrepreneur a broker. . . ."

"[C]onsideration must be given to the totality of the economic bundle of rights and powers which the party whose status is being considered possesses. The economic function performed by Checkrite was to assemble a group of stations, and to assure that the refiner's brand would be displayed and its products sold at the stations, and that the refiner's leased equipment would be protected against vandalism. This in turn required Checkrite to acquire ownership of the real property or control through long term leases, and thereafter to lease or sub-lease the eleven properties to station operators who would hire employees and man the pumps. For this service. . . *Checkrite earned a profit or economic rent,* paid *in this instance by the refiner, but ultimately passed along to the consumer. The same economic result could have been received by Checkrite if it had purchased the*

> *motor fuel or accepted it on consignment from Amoco, and then resold the product to its sub-tenants. It was not necessary for Checkrite* to resell product in order to accomplish its economic purpose. Indeed, it was more practical to have the station operators buy the motor fuel directly from Amoco." (Emphasis added.)

The paragraph (immediately above) is consistent with the oral argument made in the district court, viz: the "difference" between a "distributor" which respondent claims petitioner is not, and a "broker" which it claims petitioner is, is more theoretical than actual.

At the hearing in the district court, the court was apprised that in a dealer-distributor-major oil company situation, the dealer most often orders his requirements direct to the major oil company and pays upon delivery to the major oil company, even though the distributor has agreed to buy and pay the major oil company. It evolves into a bookkeeping situation; the major oil company collecting from the dealer both its charge and the distributor's commission, then bills the distributor for the delivery, and credits him with the collection, and lastly remits the commission. In the case at bar, essentially, the same has taken place (District Court Docket Entry 13 of 5/19/80; 2a).

In each case it is the control of the gas station sites which each has to offer and which the major oil company bargains for, leaving the economic cost of the sites to the "broker" or "distributor."

> "There are numerous other factors affecting the choice of legal form, including comparative cost of insurance, the risk of theft or loss, and the necessity to supervise. . . but viewed as an

economic reality, the position of Checkrite in this relationship is almost identical to that of a jobber, who has a captive group of station operators pledged to it by contract to sell whatever brand of motor fuel it designates, and who supplies the captive stations with the product which it in turn buys from the refiner; clearly the jobber is protected by the PMPA. *The difference in legal form between Checkrite's operation and that of the typical or traditional petroleum jobber bears no direct relationship in the economic realities. The economic realities make Checkrite a jobber.*" (Emphasis added.)

7. The district court concluded:

"... based on the relevant legislative history of PMPA that Checkrite is a 'franchisee' under the PMPA. Furthermore, the Court concludes that the contract between Amoco and Checkrite is a 'franchise' as defined in the PMPA because the contract is one between a refiner, Amoco, and a 'distributor', Checkrite, under which the refiner authorized the distributor to use the refiner's trademark at its leased stations in connection with the sale, consignment or distribution of motor fuel, the Court so finds because the contract directs Checkrite to obtain dealers to sell branded Amoco motor fuel."

Thus, petitioner was an arm in the distribution process, and a co-distributor with Amoco, in short, a distributor both in fact and function.

REASONS FOR GRANTING THE WRIT

The reasons relied upon for the allowance of this writ are:

1. A review of the PMPA by this Court will be one of first impression as it was in the district and circuit courts of appeals.

2. The case involves the question whether PMPA was enacted to protect the right of the public, and all those directly involved in the marketing of petroleum, including dealers and petitioner, and the need for a fullsome interpretation to carry out the congressional intent, or, shall the PMPA be construed to exclude, thus emasculating such intent.

3. The issue in this case and the decisions is of immense importance to the entire petroleum industry and to the rights of the participants therein which may be curtailed or eliminated by said decision.

4. Matters involving the PMPA pend in most district courts in the country. Some may be pending in circuit courts. A decision by this Court, especially pertaining to the proper interpretation of the PMPA, will prove very helpful to all inferior courts.

5. One of the issues in this case is whether the ultimate criteria is the congressional intent, or shall the literal reading of specified words be the criteria in the interpretation of legislation, in this case, and in all future cases decided under the PMPA.

6. An apparent conflict exists in the proper interpretation of legislation by the circuit court in this case and that in *Central Hanover Bank & Trust Co. v. Commr. of Internal Revenue,* 159 F.2d 167 at 169 (Judge Learned Hand) (2nd Cir. 1947), *cert. denied,* 331 U.S. 836, and the conflict should be resolved by this Court.

I.

The ultimate question in legislative construction is: congressional intent. It is to be gathered from the statutory scheme that Congress enacted into law.

Can the full congressional intent be gathered from language alone? Or in the absence of persuasive reasons in the legislation itself to the contrary, would it not be sterile, unduly sterile, not to find the congressional intent?

Congressional intent finding does not involve redefining words; rather it is giving a fullsome meaning not to a single word, but to all words taken as a whole.

We submit that a consideration of the whole of PMPA is required:

> "The whole may be greater than the sum of its parts." (Mr. Justice Holmes, *Union Pacific R.R. v. Hadley,* 246 U.S. 330, 332).
>
> "By dissecting the act bit by bit and casting off vital parts, the Court fails to recognize that the whole of the act is greater than the sum of its parts." (Mr. Justice Burger, *Buckley v. Valco, Secy. of the U.S. Senate,* 424 U.S. 1, 235).

The prior history and cases are consistent with the opinion of the district court, which should be reinstated.

In Point II appears our argument that the PMPA is essentially legislation of an equitable nature and should receive an equitable interpretation.

The circuit court cited *Lewis v. United States*, 445 U.S. 55 at 60; *Consumers Products v. GTE Sylvania*, 447 U.S. 102 at 108; *Caminetti v. United States*, 242 U.S. 470 at 474 and *Bd. of Education v. Harris*, 622 F.2d 599 for the proposition that (a) construction has for its starting point, the language of the statute; (b) the clearly expressed legislative intent is to be found and (c) when words are free from doubt, they must be taken as the final expression.

The district court's reasoning embraced (a) and (b) above, but stated that after refraining from redefining words, that the entire process would be a sterile statutory analysis if it failed or refused to consider the congressional purpose citing *Touche Ross v. Reddington*, 442 U.S. 560 at 565; *Chapman v. Houston Welfare*, 441 U.S. 600 at 608 and *Central Hanover Bank v. Commr. of Internal Revenue*, 159 F.2d 167 (2nd Cir.), *cert. denied*, 331 U.S. 836.

It appears that the circuit court's opinion is based on three decisions in the United States Supreme Court, one of which is *Touche Ross v. Reddington*, 442 U.S. 560 (upon which both the circuit courts and district courts rely) and the other two are *Reiter v. Sonotone*, 442 U.S. 330 and *Southeastern Comm. College v. Davis*, 442 U.S. 397.

We submit that *Touche Ross*, and its doctrine that

> "The ultimate question is one of Congressional intent"

should prevail and it should be determinative of our case.

The holding is wholly consistent with *Central Hanover Bank v. Commr. of Internal Revenue*, 159 F.2d 167, and thus the

opinion of the circuit court in this case is inconsistent with the two cases.

In our view, we read *Southeastern Community College* which after reciting that the starting point in construction is the language of the statute, then went on to show that the Court looked for and found the congressional intent, and found it to be sweeping rather than restrictive; it considered the overall intent rather than a single word, sentence or proviso.

We read *Reiter v. Sonotone, supra,* as enunciating that where the legislative history demands no "exclusionary scope" to a word, phrase or sentence, then a non-strict or non-literal construction consonant with the legislative intent is proper (442 U.S. 330 at 342-3).

Thus, in construing the phrase "injured in his business or property" (§4 Clayton Act), despite earlier court interpretations that it did not include a consumer, this court found no legislative history requiring the non-inclusion of a consumer.

The above, we deem, not to be differentiable from giving a better and in-depth meaning to the words "franchisor and franchisee" and to put a functioning meaning to "distributor", one that includes persons having the "trappings" of a "distributor" and being an integral part of the marketing process so that he will have the obligations of the PMPA and the correlative rights.

While not determinative or conclusive upon this Court, but in our view representative of legal thinking, giving support to the district court's expository remarks and decision, and to the soundness of Judge Learned Hand's opinion in *Central Hanover Bank v. Commr. of Internal Revenue, supra,* is the following:

The Fifth Circuit, in *A.J. Batterton v. United States*, 406 F.2d 247, held that the *circuit court has the power to construe a statute contrary to its literal language to achieve the true interest of Congress.*

Judge Blumenfeld (Conn.) in *In re Master Key Anti-Trust Litigation*, in 53 F.R.D. 87 (1971), at 89 commented very favorably, upon the "oft cited guidelines, laid down by Judge Learned Hand" in *Central Hanover Bank, supra,* to arrive at an interpretation.

A whole line of cases in the Court of Appeals of New York have reaffirmed Judge Hand's opinion concerning guidelines for construction in *Central Hanover Bank,* to wit;- *Abbod v. Hospital Ambulance,* 30 N.Y. 2d 295 at 298; *Matter of Kosek,* 31 N.Y. 2d 475 at 484-5; *Matter of Johnson,* 32 A.D. 2d 239 at 244.

Judge Hand on another occasion "cautioned that we be wary of making a fortress out of the dictionary." *Cabell v. Markham,* 148 F.2d 737 at 739.

This Court in *Towne v. Eisner,* 245 U.S. 418 at 425, stated:

> "a word. . . may vary greatly in color and content, depending upon the intention of its author and the circumstance under which it is used."

In summation, then, we submit that the function of Checkrite in the marketing system, the economic investment provided by Checkrite, the fact that Checkrite controlled the sites through (1) fee ownership; (2) being the dominant lessee; or (3) through supply agreements with the dealers, the sites, the use to which Amoco put petitioner's function to accomplish Amoco's aim of excluding competition from the sites, rendered Checkrite to be an essential cog in the distribution, and an arm of Amoco. To terminate

Checkrite no less than terminating a dealer, is inequitable to Checkrite, to the dealers and to the society as a whole.

It was to ameliorate this very situation that PMPA came into being; it is to effect this purpose that Checkrite is entitled to be covered, it being an essential cog in the industry.

II.

The PMPA is not in derogation of the common law.

It is a codification of an equitable principle, namely, the elimination of the unequal bargaining power of those engaged in the petroleum industry marketing system *vis-a-vis* the major oil company-refiners. The elimination of the vices inherent in these qualities and the harm to the public arising therefrom is its purpose.

The consolidation of courts of chancery with common law courts, and the right to plead equitable claims and defenses in one and the same pleading, has not displaced equitable legal precepts from the body of rules and remedies administered by courts of law, *i.e.*, the common law or codified law.

Common law and equitable principles are not one and the same (Pomeroy, *Equity Jurisprudence*, 5th Ed., Sections 16 and 40; *Bouvier Law Dictionary*.

"Conscience" and "morality" are some of the basic ingredients and are synonymous with equity (Pomeroy, *Equity Jurisprudence*, §§45, 56).

Thus, courts retain a certain power and freedom of action not possessed by courts of law, of adapting the doctrines he administers. It rests upon truths of morality rather than arbitrary customs and "rigid dogmas". This enables a court to extend these

doctrines to new relationship and shape the remedy to the new circumstance (Pomeroy, *Equity Jurisprudence*, §§59-60).

Thus, and importantly, when a legislative enactment is said to be "interpreted equitably", it means "according to the equity of the statute." (Pomeroy, *Equity Jurisprudence*, §45).

It is the application of equity to the interpretation of legislative enactments, and to enactments essentially equitable, that is involved in this case.

Put in another way, the intent and purpose of PMPA is to require the major oil companies to deal fairly and equitably with those through whom the marketing of fuel to the ultimate consumer is carried out.

The intent of Congress is clear. It was stated to be:

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> Central to the problems faced by franchisees in this regard is the disparity of bargaining power which exists between the franchisor and the franchisee. This disparity results in franchise agreements which some franchisees have argued amount to contracts of adhesion. The provisions of the contracts between the franchisor and the franchisee and the permeating influence of these contracts over nearly every major aspect of the franchisee's business may translate the original disparity of bargaining power into continuing vulnerability of the franchisee to the demands and actions of the franchisor.

> It is important to note that while the relationship of the parties to a motor fuel franchise agreement is basically contractual in nature, normal remedies for violations of the contractual provisions are often eschewed by the franchisor. The disparity of bargaining power which disadvantages the franchisee in negotiations leading to execution of the franchise agreement manifests itself in the contractually provided remedies for contract violations or changes in circumstances. Commonly the franchisor is able to capitalize on his disparity of bargaining power to obtain great flexibility with respect to his rights to terminate the contractual relationship. As a result, termination of franchise agreements during the term as a remedy for contract violations has been repeatedly utilized." U.S. Code Cong. & Ad. News (1978) at 876.

To the same effect, *Balder v. Standard Oil Co.*, 642 F.2d 107, 109 (5th Cir. 1981); 1981-1 Trade Cases, 91-63, 934 at 75,833).

Thus, we may conclude that the statute itself is a codification of equitable principles, and not in derogation of the common law.

We submit this was the view of this Court when it upheld the right of the New Jersey court to bottom the right of a gasoline dealer, to protection against inequitable termination by Shell Oil upon the basis, that it was against the public policy to permit termination that such right was not barred because the New Jersey statute (N.J.S.A. 56:10-5), was not enacted until after the dealers commenced his relationship with Shell Oil. *Shell Oil Co. v. Marinello,* (1973) 63 N.J. 403, 307 A. 2d 598, *cert. denied,* 415 U.S. 920.

Public policy in the sense it was used was nothing more than doing equity.

CONCLUSION

For the reasons assigned, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit and upon review, to reverse and direct the reinstatement of the district court's opinion and judgment with an additional direction that petitioner be given an opportunity to prove damages.

Respectfully submitted,

JACOB E. HELLER
Attorney for Petitioner

APPENDIX
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 771, 795—August Term, 1981

(Argued: February 25, 1982 Decided: April 1, 1982)

Docket Nos. 81-7792, 81-7832

CHECKRITE PETROLEUM, INC.,

Plaintiff-Appellee-Cross-Appellant,

—against—

AMOCO OIL COMPANY,

Defendant-Appellant-Cross-Appellee.

Before:

FEINBERG, *Chief Judge*, VAN GRAAFEILAND and MESKILL, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Brieant, *J.*, enjoining appellant under the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 *et seq.* (Supp. IV 1980), from terminating its agreement with appellee and awarding attorney's fees to appellee.

Reversed.

RICHARD R. LUTZ, New York, New York (Townley & Updike, New York, New York, of counsel), *for Defendant-Appellant.*

JACOB E. HELLER, New York, New York, *for Plaintiff-Appellee.*

Opinion of The United States Court of Appeals for the Second Circuit

MESKILL, *Circuit Judge:*

Amoco Oil Company ("Amoco") appeals from a judgment of the United States District Court for the Southern District of New York, Brieant, *J.*, enjoining it under the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 *et seq.* (Supp. IV 1980) ("PMPA"), from terminating[1] its agreement with Checkrite Petroleum, Inc. ("Checkrite") except in accordance with the PMPA and awarding Checkrite attorney's fees. Because we find that the PMPA does not apply to the relationship between Amoco and Checkrite, we reverse.[2]

BACKGROUND

On March 31, 1976, Amoco and Checkrite entered into a contract covering the five-year period ending May 30, 1981. The agreement, which was drafted by Amoco, designated Checkrite a "broker." Under the terms of the contract, Checkrite agreed to "cause" retail gasoline dealers listed in an attached Schedule "A"

> to execute and deliver to Amoco Dealer Sales Agreements on Amoco's standard form being offered to Amoco in the Metropolitan New York City area whereby such dealers contract to purchase from Amoco, petroleum products for resale at said service stations.

App. at 18. As consideration for Checkrite's efforts, Amoco agreed to pay Checkrite a commission of 1.9 cents on each gallon of gasoline and ten per cent on the dollar volume of motor oil sold by Amoco to the dealers listed on Schedule "A".

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[1] Because Checkrite's agreement with Amoco expired under its terms before the district court issued the injunction in this case, the injunction should, technically, have prohibited Amoco from failing to renew the agreement under 15 U.S.C. § 2802(a)(2), rather than from terminating the agreement under 15 U.S.C. § 2802(a)(1). For clarity, we adhere to the district court's terminology which apparently has not confused the parties in this case.

[2] Checkrite cross-appeals from the district court's denial of its request for damages. Because we hold that Checkrite is entitled to no relief under the PMPA, we affirm the denial of a damage award.

Amoco entered into contracts directly with these retail dealers under which Amoco agreed to sell and to deliver gasoline and diesel fuel to the dealers at its standard prices. The dealer agreements also provided for the dealers' use of Amoco's trademark.

Amoco informed Checkrite by letter dated November 25, 1980 that it did not intend to renew or extend its agreement with Checkrite after the May 30, 1981 expiration date. Checkrite then instituted this suit, claiming that it maintained a "franchise relationship" with Amoco and was therefore protected against termination under the PMPA. The complaint sought actual damages, exemplary damages, injunctive and declaratory relief, attorney's and expert witness' fees, costs and disbursements.

The district court ruled that while Checkrite would not be entitled to protection under a "narrow reading" of the statute,

> Checkrite fits within the purpose of the PMPA as an independent entrepreneur whom Congress thought worthy of protection against unjustified termination; therefore Checkrite is a franchisee within the purpose of the statute.

App. at 86. Accordingly, the court granted summary judgment for Checkrite.[1]

DISCUSSION

The purpose of the PMPA is to establish "minimum Federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchisor or supplier of such fuel." S. Rep. No. 95-731, 95th Cong., 2d Sess. 15, *reprinted in* [1978] U.S. Code Cong. & Ad. News 873, 873. Section 102 of the PMPA, 15 U.S.C. § 2802, prohibits a franchisor from terminating or failing to

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[1] The district court enjoined Amoco from terminating its agreement with Checkrite without complying with PMPA requirements and awarded Checkrite attorney's fees. The court denied Checkrite's pleas for other relief.

renew a franchise without satisfying certain notice provisions and without stating a reason for termination sanctioned by the act. It is undisputed that Amoco did not satisfy the PMPA termination requirements in its dealings with Checkrite. The issue in this case is whether Checkrite is a "franchisee" within the meaning of the act.

"[I]n any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself." *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Products Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Russo* v. *New York*, slip op. 1223, 1236 (2d Cir. Feb. 9, 1982). The PMPA contains the following relevant definitions:

As used in this subchapter:

(1)(A) The term "franchise" means any contract—

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

. . . .

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

. . . .

(4) The term "franchisee" means a retailer or distrib-

utor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who—

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

. . . .

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

15 U.S.C. § 2801.

Checkrite neither purchases motor fuel nor receives it on consignment from Amoco. Therefore, Checkrite is neither a "distributor" nor a "retailer" within the plain wording of the PMPA.[4] Because only retailers and distributors fall within the statute's definition of "franchisee," Checkrite is not within the PMPA's plain terms. It is a well-established rule

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[4] Checkrite persists in the argument, rejected by the district court, that it is an affiliate of Amoco and is therefore a "distributor" under the PMPA. Since there is no basis in the record to support a finding that Checkrite "controls, is controlled by, or is under common control with" Amoco, we need not pass on the rest of Checkrite's reasoning on this point.

that "when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn . . . from any extraneous source." *Caminetti* v. *United States*, 242 U.S. 470, 490 (1917); *Board of Education* v. *Harris*, 622 F.2d 599, 609 (2d Cir. 1979), *cert. denied*, 449 U.S. 1124 (1981). Strict construction is particularly appropriate where, as here, the statute in question is in derogation of common law rights. *See, e.g., In re Liberatore*, 574 F.2d 78, 85 (2d Cir. 1978); *United States* v. *Mead*, 426 F.2d 118, 123 & n.5 (9th Cir. 1970); *Bauers* v. *Heisel*, 361 F.2d 581, 587 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967).

Despite these well-known canons of statutory construction, and notwithstanding its failure to satisfy the unambiguous statutory definition of "franchisee," Checkrite argues, and the district court found, that the legislative history of the PMPA indicates that Congress intended to "accord broad protection to persons 'marketing' branded fuels." App. at 80. The court held, therefore, that Checkrite was within the intended scope of PMPA protection. Even if it were necessary in this case to search beyond the statutory language for an expression of legislative intent, we would disagree with the district court's conclusion.

The district court relied principally on two passages of legislative history in concluding that Checkrite is a "franchisee." First, the court cited the Senate Report on the PMPA, which states:

> The committee also sought to resolve a problem raised by the definition of "distributor" in title I. Under H.R. 130 as presented to the committee a distributor includes a person or his affiliate "who receives motor fuel on consignment for consignment or distribution *to his own motor fuel accounts*." (emphasis added)
>
> The question arises of distinguishing a consignee's accounts from those of his supplier. The committee was concerned that a consignee might be treated as a dis-

tributor under H.R. 130 with respect to some accounts but not with respect to others. Rather than attempt to delineate a means of making this distinction as to ownership or control of the accounts, the committee chose to treat a consignee as a distributor regardless of whether the account is that of the consignee or of the supplier.

However, the committee included a proviso that the definition of distributor does not include employees of the supplier, nor a person who merely serves as a common carrier who provides transportation services for the supplier. With this proviso the committee retained the distinction that independent entrepreneurs are to be included as distributors while employees of the supplier or those common carriers who merely supply transportation as would a common carrier are not distributors under this definition.

S. Rep. No. 95-731, 95th Cong., 2d Sess. 27, *reprinted in* [1978] U.S. Code Cong. & Ad. News 873, 885.

The relevance of this passage to the issue in this case is dubious. In any event, the passage provides no support for Checkrite's position. The passage specifically addresses particular problems of the definition of "distributor" as it relates to consignees. Because consignees are covered by the PMPA's definition of "distributor" the Senate Report suggests no congressional intent beyond that expressed by the statute's plain terms.

The district court also relied heavily on the remarks of Representative Dingell during the House debates on the PMPA:

It was our intention to cover a consignee or commission agent where he in fact provides the functions and services of a jobber. It was not intended that a consignee would be covered if, in fact, he is an employee. This is a question of fact resolution of which lies in the hands

of the courts whose job it will be to see that fairness is accorded to all parties.

> Let me read from the report. The report states:
>
> '[I]t is intended that the provisions of the title would apply to a consignee who acts generally like a jobber.'
>
> What I am saying is that where a person has the characteristics of an employee, although he in fact does handle the product, he is not covered. It is not our intention to expand the rights of employees. Where a consignee functions, however, as a jobber and does everything that a jobber would do, save taking title to the motor fuel—or most of what a jobber does—he would then have the protections afforded by the legislation. We have tried to draw that very narrow distinction. It is not our goal to create problems for either side in this controversy but to leave this as a fact question which will be properly and prudently decided by the court.

123 Cong. Rec. 10386 (1977).

We do not think that these remarks constitute "a clearly expressed legislative intent", *Consumer Products Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. at 108, to cover parties not within the terms of the statute. Representative Dingell was addressing the distinction between an employee of a refiner who is technically a consignee and an independent consignee. Like the references to "consignee" in the Senate Report discussed above, Representative Dingell's remarks do not contradict or go beyond that which is expressed in the plain word of the PMPA. The single reference to "commission agent" is, at most, ambiguous and hardly constitutes a sufficient ground for ignoring the statutory language.

The district court's reliance on Representative Dingell's reference to jobbers and on the claimed similarities between Checkrite and a typical jobber is also misplaced. The term "jobber," which is not defined in the PMPA, is generally taken to mean "[o]ne who buys and sells goods for others[,]"

Black's Law Dictionary 970 (4th ed. 1968), or "wholesaler[.]" Webster's Third New International Dictionary 1217 (1971). Thus, a typical branded fuel jobber would fit squarely within the PMPA definition of "distributor." Because Checkrite does not buy and sell motor fuel, it is not a typical jobber; hence Checkrite is not a distributor; and therefore Checkrite is not a franchisee entitled to protection under the PMPA.

Checkrite's final argument, adopted by the district court, is that termination of its contract with Amoco will have the same effect on the dealers covered by the contract as direct termination of the dealers by Amoco. Checkrite, claiming that it has the power to order dealers to sell or not to sell any brand of gasoline it chooses, reasons that if it is terminated by Amoco, it will in turn cause the dealers to terminate their agreements with Amoco. Thus, Checkrite appears to argue that if Amoco can terminate it with impunity, it can circumvent the protections that the PMPA provides against unfair termination of dealers.

This "logic" is wholly unpersuasive. The PMPA is aimed at preventing unfair and discriminatory termination of franchisees by franchisors. Amoco readily concedes that its relationships with the retail dealers involved in the Amoco-Checkrite contract are governed by the PMPA and that it cannot terminate those relationships without complying with the statute's provisions. The dealers are threatened only by Checkrite. That Checkrite might take action detrimental to dealers certainly does not provide Checkrite with rights against Amoco under the PMPA.[1]

In summary, we hold that the plain terms of the PMPA do not provide Checkrite any protection against termination

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[1] As an alternative ground for reversal Amoco asserts that Checkrite is not a "franchisee" because the Amoco-Checkrite agreement does not authorize Checkrite to use Amoco's trademark as required by 15 U.S.C. § 2801(1)(A) & (2). Because we find that Checkrite does not meet the threshold requirement of being a "retailer" or "distributor" within the meaning of the PMPA, we need not determine whether Checkrite also fails to meet the requirement of being "authorized or permitted" to use Amoco's trademark.

by Amoco, and that the legislative history of the act expresses no congressional intent to go beyond these plain terms. Therefore, we reverse the judgment of the district court and remand this case with directions to dismiss the complaint and to vacate the award of attorney's fees.

So ordered.

MEMORANDUM AND ORDER OF UNITED STATES DISTRICT COURT DATED JUNE 15, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHECKRITE PETROLEUM, INC.,

Plaintiff

-against-

AMOCO OIL COMPANY,

Defendant

81 Civ. 2541-CLB

Brieant, J.

This action, filed April 28, 1981 by plaintiff Checkrite Petroleum, Inc. ("Checkrite") against defendant Amoco Oil Company ("Amoco"), presents a question apparently of first impression in this Court: whether plaintiff, a so-called "broker," is protected as a "franchisee" under the Petroleum Market Practices Act ("PMPA"), 15 U.S.C. §2801, *et seq.*

Plaintiff originally moved pursuant to PMPA §105(b), 15 U.S.C. §2805(b), for a preliminary injunction; plaintiff requested an order restraining Amoco "from the enforcement of its attempted cancellation of plaintiff's agreement with said defendant and to carry out its alleged rights pursuant to said cancellation . . . . " Amoco thereafter moved to dismiss the complaint on the grounds that the plaintiff is not protected by the PMPA, and that plaintiff therefore may not maintain a civil action under PMPA §105(a), 15 U.S.C. §2805(a). Rule 12(b)(1) and (6), F.R.Civ.P.

Memorandum and Order of United States District Court Dated June 15, 1981

At a hearing before this Court on May 19, 1981, defendant stipulated with plaintiff in lieu of an injunction that defendant would continue, pending the disposition by this Court of the defendant's motion to dismiss the complaint, to supply its product to the dealers who were lessees of, or in a contractual arrangement with, the plaintiff.

THE FACTS

On March 31, 1976 the parties entered into a contract in which Checkrite, designated in the contract drawn by Amoco as the "Broker," agreed to "cause" a number of listed station operators, or dealers to "execute and deliver to Amoco, Dealer Sales Agreements on Amoco's standard form . . . whereby such dealers contract to purchase from Amoco, petroleum products for resale at said service stations," during the term of the contract. In consideration, Amoco agreed to pay to plaintiff a "commission" of 1.9 cents per gallon on each gallon of gasoline that Amoco sold or delivered to the operators. Amoco also agreed to pay plaintiff a commission on the sale of motor oil to these operators. The term of this contract extended from June 1, 1976 to May 30, 1981. This contract contained a provision concerning renegotiation and renewal of the contract by the parties. Should the contract not be renewed, Checkrite would have been able to change the colors of the stations by directing the operators to purchase elsewhere.

Pursuant to this agreement, plaintiff entered into contracts with station operators, whereby plaintiff would lease service stations to these operators on the condition that the operators would purchase motor fuel and other supplies from the company designated by the plaintiff. To complete the three-sides arrangement, Amoco entered into contracts with these operators.

Memorandum and Order of United States District Court Dated June 15, 1981

Under these contracts defendant agreed to supply the station operators with Amoco products, which the operators then resold to consumers, using the applicable Amoco trademarks. Amoco also leased to the various operators equipment necessary to continued operation of the stations. At present, there are eleven station operators which have entered into such contracts with both plaintiff and defendant.

By letter dated November 25, 1980, Amoco notified Checkrite that Amoco had "decided that it does not wish to extend, renew, or enter into a new agreement" with Checkrite. This litigation resulted.

In its complaint, plaintiff characterizes its relationship with Amoco and the dealers as a "tri-party agreement," and asserts that "it was the intent that defendant be the actual supplier, that defendant acting in concert with plaintiff arrange and obtain the dealer, make available to the dealer a station at which only the product of defendant be sold and the plaintiff undertake to supply defendant's product and dedicate his property to the operation." The complaint states that plaintiff is entitled to the protection of the PMPA because it is in a "franchise-relationship" with the defendant, as well as a "distributor-affiliate." The complaint requests damages, injunctive and declaratory relief, exemplary damages, reasonable attorneys and expert witness fees, costs and disbursements. Jurisdiction in this Court is founded on 15 U.S.C. §2805(a).

The Petroleum Market Practices Act

The Petroleum Market Practices Act, 15 U.S.C. §§ 2801-28, enacted June 6, 1978 as Pub.L. No. 95-297, 92 Stat. 322,[1] has

as its purpose the "establishment of minimum Federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchisor or supplier of such fuel." S.Rep. No. 95-731, 95th Cong., 2d Sess. 15 (1978, reprinted in [1978] U.S. Code Cong. & Ad. News 873, 873. *See, Halder v. Standard Oil Co., et al.*, 642 F.2d 107, 109 (5th Cir. 1981), 1981-1 Trade Cas. 91 63,934 at 75,833 (the purpose of the PMPA is to "increase the bargaining strength of individual franchisees in the petroleum industry").

Under §102 of the Act, 15 U.S.C. §2802, a franchisor may not terminate or fail to renew any franchise unless the franchisor complies with specific notification procedures found in §104 of the PMPA, and unless the franchisor terminates or fails to renew the franchise based upon one or more of the grounds enumerated in §102. These grounds include a failure by the franchisee to comply with any reasonable and materially significant provision of the franchise agreement; a failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise; and the occurance of an event which is relevant to the franchise relationship and which reasonably leads to a termination of the franchise. Each of these grounds and the other permissible grounds for termination contain time limitations by which a franchisor must exercise its right to terminate.

Section 104 of the PMPA, 15 U.S.C. §2804, requires that a franchisor furnish the franchisee with notification of a termination, in most cases, not less than 90 days prior to termination. The termination notice must be in writing, posted by certified mail or personally delivered to the franchisee, and must contain a statement of the franchisor's intention to terminate

and its reasons for termination, the date on which the termination will take effect, and a summary statement, prepared by the Secretary of Energy, setting forth the terms of the PMPA.

Defendant Amoco concedes that the notice of termination sent to Checkrite did not comply with these provisions of the PMPA; for instance, the notice did not state the reasons for termination of the agreement, nor did it contain the summary statement. Amoco argues, however, that it was not required to terminate its agreement with Checkrite in accordance with the PMPA, because the agreement between Checkrite and Amoco was not a "franchise," as that term is defined in the PMPA.

Amoco also argues that Checkrite, because not a "franchisee," may not maintain an action against Amoco under the PMPA §105(a), 15 U.S.C. §2805(a), which provides in relevant part that "if a franchisor fails to comply with the requirements of section 2802 or 2803, the franchisee may maintain a civil action against such franchisor [which] may be brought, without regard to the amount in controversy, in the district court of the United States . . . ." It is to this latter jurisdictional issue which the Court now turns.

In resolving whether plaintiff is a franchisee under the PMPA, this Court's "analysis must begin with the language of the statute itself," *Touche Ross & Co. v. Redington,* 442 U.S. 560, 568 (1979), and this language must be given its "ordinary meaning in the absence of persuasive reasons to the contrary," *Burns v. Alcala,* 420 U.S. 575, 581 (1975). Where Congress has specifically defined a word in a statute, as in the instant case, this Court must not redefine such words in ways not contemplated by the Congress. Nevertheless, a court's statutory analysis would be unduly sterile

if it refused to consider the purposes Congress sought to serve by enacting a particular statute. *See Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 608 (1979).

The PMPA contains the following relevant definitions:

> "As used in this subchapter:
>
> (1)(A) The term 'franchise' means any contract—
>
> (i) between a refiner and a distributor,
>
> (ii) between a refiner and a retailer,
>
> (iii) between a distributor and another distributor, or
>
> (iv) between a distributor and a retailer,
>
> under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.
>
> (2) The term 'franchise relationship' means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.
>
> (4) The term 'franchise' means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

> (5) The term 'refiner' means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.
>
> (6) The term 'distributer' means any person, including any affiliate of such person, who—
>
> (A) purchases motor fuel for sale, consignment, or distribution to another; or
>
> (B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for such supplier.
>
> (7) The term 'retailer' means any person who purchases motor fuel for sale to the general public for ultimate consumption.
>
> (15) The term 'affiliate' means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person." 15 U.S.C. §2801(1)(A), (4), (5), (6), (7), (15).

Defendant here argues that Checkrite is not a "franchisee," because Checkrite is neither a distributor nor a retailer, as those terms are defined above. Defendant asserts that the agreement between Amoco and Checkrite demonstrates that Checkrite does not purchase motor fuel from Amoco, does not receive motor

fuel on consignment from Amoco, and does not purchase motor fuel for sale to the general public. Pointing to the Senate Report on the PMPA, Amoco contends that Checkrite therefore has not, as required, met its "burden of proving the existence of a franchise, his status as a franchisee, and the termination of the franchise or nonrenewal of the franchise relationship." S. Rep. No. 95-731, 95th Cong., 2d Sess. 15, 41, *reprinted in* [1978] U.S. Code Cong. & Ad. News 873, 899.

In an attempt to meet this burden, plaintiff argues that it is "a person involved in the (i) distribution, (ii) in the gasoline service station serviced by the distribution, (iii) in the arrangement between defendant and the dealers, etc." Plaintiff further contends that it is "an Affiliate of the distributor-refiner in this case," an "arm of defendant's distributive system," a "distributor-cosignee," and that it "may even be covered as an Affiliate or as an arm of the Dealer." Even assuming that plaintiff is an "Affiliate of the distributor-refiner," presumably Amoco, this would make plaintiff at best a franchisor, rather than a franchisee, in this case; therefore, it is not necessary to consider this contention further.

To analyze plaintiff's contentions that it is a "distributor-consignee" and "an arm of defendant's distributive system," the Court must turn to the PMPA, which defines a "distributor" as a person, including an affiliate of such person, who either purchases motor fuel or receives motor fuel on consignment. *See* 15 U.S.C. §2801(1)(A)(6). While Checkrite does not allege in its complaint that it either purchases motor fuel or receives motor fuel on consignment from Amoco, Checkrite does contend that it is "involved in the sale of fuel products at the dealer level," without describing the involvement. *See* Letter from Jacob Heller, Esq. to the Court of May 20, 1981 and docketed herein.

Memorandum and Order of United States District Court Dated June 15, 1981

This statement does not, however, find support in the Agreement between Amoco and Checkrite, which provides that:

> "1. Broker represents to Amoco that there are fully equipped and going filling and automobile service stations at the locations leased to, or owned by, retail dealers *in the operation of whose stations* Broker does not participate . . . ." (Emphasis added).

Another paragraph in that Agreement provides that:

> "14. In the event Broker, as an individual or through any subsidiary or controlled corporation, becomes the retail dealer at an account identified in Schedule 'A' such station will automatically be eliminated from Schedule 'A' and the terms of this Contract, and Amoco would then enter into a contractual relationship with Broker as a dealer, no further commissions would be paid on gasoline sold at said service station."

The only provision of the Agreement which shows any "involvement" by Checkrite in the sale of fuel products states that "it shall be the responsibility of Broker to insure that Amoco's equipment located at [the specified facilities] is secured from vandalism and Broker shall be responsible for cost of replacement should vandalism occur."

In the absence of a straightforward assertion by the plaintiff that it sells or purchases fuel, or that it receives fuel on consignment, this Court concludes that under a narrow reading of the PMPA Checkrite would not be considered a "distributor."

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Checkrite is arguably an affiliate of the 11 operators in that Checkrite may "control" these operators. These operators, however, are not distributors under the PMPA, but rather they are "retailers," who sell fuel products directly to the consuming public. Because the definition of "retailer" under the PMPA, in contrast to the definition of "distributor," does not include an "affiliate" thereof, plaintiff's assertion that it may be an "affiliate" of the station operators does not accord plaintiff the status of a "retailer" under the PMPA.

As revealed by the discussion above, a narrow reading of the statutory definitions found in the PMPA excludes Checkrite from coverage thereunder as a franchisee. Checkrite argues strongly, however, in essence, and the Court agrees, that such a literal reading frustrates the legislative purpose of the PMPA. In the widely quoted words of Judge Learned Hand:

> "There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a court ever less likely to do its duty than when, with an obsequious show of submission, it disregards the overriding purpose because the particular occasion which has arisen, was not foreseen. That there are hazards in this is quite true; there are hazards in all interpretation, at best a perilous course between dangers on either hand; but it scarcely helps to give so wide a berth to Charybdis' maw that one is in danger of being impaled upon Scylla's rocks." *Central Hanover Bank & Trust Co. v.*

Memorandum and Order of United States District Court Dated June 15, 1981

Commissioner of Internal Revenue, 159 F.2d 167, 169 (2d Cir. 1947), *cert. denied*, 331 U.S. 836 (1947).

Checkrite contends that if Amoco is allowed to terminate its contract with Checkrite without following the procedures required by the PMPA, the 11 operators (involved in the tri-partite relationship among Checkrite, Amoco and the operators) will also be terminated by Amoco without having been accorded the protections of the PMPA. This contention is based upon the following reasoning: after the contract between Checkrite and Amoco is terminated, Checkrite, of course, will not designate Amoco as the supplier for the 11 operators to whom Checkrite leases service stations; these operators, however, currently have dealer supply agreements with Amoco; Amoco's offer in this case to release these operators from their contracts with Amoco would, if accepted, effectively terminate the franchise relationship between Amoco and the operators, and would be accomplished by Amoco without compliance with the PMPA.[1]

Thus, although Amoco has conceded that the station operators are "franchisees" under the PMPA, and that therefore Amoco cannot terminate them without complying with the PMPA, and although Amoco has stated that it will continue to honor its supply agreements with the operators despite its termination of its contract with Checkrite, Checkrite contends, and the Court finds, that the inevitable practical effect of the termination by Amoco of its agreement with Checkrite will be the termination at the instance of Checkrite of the franchise relationship between Amoco and the 11 operators. Checkrite argues essentially, therefore, that the purpose Congress sought to serve in enacting the PMPA would be served more fully if the definition of

franchisee under the PMPA were read to include persons or companies such as Checkrite, who possess a significant part of the bundle of economic rights or powers characteristic of a "franchisee" marketing brand name motor fuel.

The legislative history of the PMPA provides support for plaintiff's contentions. That history suggests that, although Congress did not explicitly define "franchisee" to include a "broker" or middleman such as Checkrite, who controls a retail station by contract as to its purchase of motor fuel, but who does not actually sell, purchase, or receive motor fuel, Congress did intend that the PMPA would accord broad protection to persons "marketing" branded fuels.

The Senate Report states that the "term 'distributor' is defined broadly to include both marketers who purchase motor fuel for distribution and those who receive motor fuel on consignment for distribution to their own motor fuel accounts or to those of their supplier." S.Rep. No. 95-731, 95th Cong., 2d Sess. 30, *reprinted in* [1978] U.S. Code Cong. & Ad. News 873, 888. The Report expanded on this issue:

> "The committee also sought to resolve a problem raised by the definition of distributor in title I. . . . . The question arises of distinguishing a consignee's accounts from those of his supplier. The committee was concerned that a consignee might be treated as a distributor under H.R. 130 with respect to some accounts but not with respect to others. Rather than attempt to dilineate a means of making this distinction as to ownership or control of the accounts, the committee chose to

> treat a consignee as a distributor regardless of whether the account is that of the consignee or of the supplier." *Id.* at 27, *reprinted in* U.S. Code Cong. & Ad. News 873, 885.

The Committee noted that it had retained the distinction from the House version of the bill, that:

> "independent enterpreneurs are to be included as distributors while employees of the supplier of those common carriers who merely supply transportation as would a common carrier [sic] are not distributors under this definition." *Id.*

During the House debate on the PMPA, the Act was described as extending full franchise protection to distributors and jobbers, who in turn had an obligation to comply with the PMPA in their dealings with their own franchisees. 123 Cong. Rec. H 3013 (April 5, 1977) (remarks of Rep. Dingell). The franchise relationship was described as "the agreement a jobber has with a refiner and the agreement that a jobber or refiner has with a service station *through which the refiner's brand is used in marketing the motor fuel.*" 123 Cong. Rec. _____, H 3014 (April 5, 1978) (remarks of Rep. Brown) (Emphasis added). In contrast, the PMPA was not, according to debate in the House of Representatives, designed to address the issue of "the security of the supply relationships of *nonbranded independent marketers, that is, marketers which are not franchisees.*" 123 Cong. Rec. ____, H 3013 (April 5, 1977) (remarks of Rep. Dingell) (Emphasis added).

In the instant case, the contracts among Amoco, Checkrite

and the station operators clearly set forth an agreement for the joint marketing by these companies, or individuals, of branded fuel.

This Court finds strong support for the plaintiff's position in the following statement:

> "It was our intention to cover a consignee or commission agent where he in fact provides the functions and services of a jobber. It was not intended that a consignee would be covered if, in fact, he is an employee. This is a question of fact resolution of which lies in the hands of the courts whose job it will be to see that fairness is accorded to all parties.
>
> Let me read from the report, The report states:
>
> '[I]t is intended that the provisions of the title would apply to a consignee who acts generally like a jobber.'
>
> What I am saying is that where a person has the characteristics of an employee, although he in fact does handle the product, he is not covered. It is not our intention to expand the rights of employees. Where a consignee functions, however, as a jobber and does everything that a jobber would do, save taking title to the motor fuel—or most of what a jobber does—he would then have the protections afforded by the legislation. We have tried to draw that very narrow distinction. It is

> not our goal to create problems for either side in this controversy but to leave this as a fact question which will be properly and prudently decided by the court." *Id.* at _____, H 3016 (remarks of Rep. Dingell).

This statement, together with the other legislative history noted, suggests that in enacting the PMPA, Congress did not intend to protect only those persons who literally take formal title to or consignment of motor fuel, but also those independent entrepreneurs who market branded motor fuel on behalf of oil companies.

This Court finds that Checkrite is an independent entrepreneur engaged in marketing Amoco's branded motor fuel. Although the contract between Checkrite and Amoco, drawn by Amoco, labels Checkrite as a "broker," Checkrite did more than merely act as such. In addition to "finding" dealers for Amoco (the contract between Checkrite and Amoco contemplated that), Checkrite would lease service station to operators who would sell Amoco fuel. Checkrite also had an ongoing responsibility under the contract to assure that Amoco's equipment, located at its leased stations, was secure from vandalism.

This Court therefore concludes, based on the relevant legislative history of the PMPA, that Checkrite is a "franchisee" under the PMPA. Furthermore, the Court concludes that the contract between Amoco and Checkrite is a "franchise," as defined in the PMPA, because the contract is one between a refiner, Amoco, and a "distributor," Checkrite, under which the refiner authorized the distributor to use the refiner's trademark at its leased stations in connection with the sale, consignment or

distribution of motor fuel; the Court so finds because the contract directed Checkrite to obtain dealers to sell branded Amoco motor fuel.

This Court notes that for various reasons, the business relationships by which any product, including motor fuel, is brought to market will comprise infinite variations in the legal forms used. Labeling an independent entrepreneur as a "broker," particularly when this labeling takes place in a contract drawn by the opposing party, does not make the independent entrepreneur a broker. Rather, consideration must be given to the totality of the economic bundle of rights and powers which the party whose status is being considered possesses. The economic function performed by Checkrite was to assemble a group of stations, and to assure that the refiner's brand would be displayed and its product sold at the stations, and that the refiner's leased equipment would be protected against vandalism. This in turn required Checkrite to acquire ownership of the real property, or control through long-term leases, and thereafter to lease or sub-lease the eleven properties to station operators who would hire employees and man the pumps. For this service which it performed as a part of the chain extending from refinery to market, Checkrite earned a profit or economic rent, paid in this instance by the refiner, but ultimately passed along to the consumer. The same economic result could have been received by Checkrite if it had purchased the motor fuel or accepted it on consignment from Amoco, and then resold the product to its sub-tenants. It was not necessary for Checkrite to resell product in order to accomplish its economic purpose. Indeed, it was more practical to have the station operators buy the motor fuel directly from Amoco. This shifted the credit risk for default in payment by the station operator from Checkrite to Amoco, and decreased the amount of

supervision of the operators which Checkrite would have to perform. Alternatively, Checkrite could have operated the eleven stations with its own employees. Indeed, the parties contemplated this possibility and provided that when and if Checkrite had to do that because of the default of a tenant operator, it would no longer receive the additional payment. There are numerous other factors affecting the choice of legal form, including comparative cost of insurance, the risk of theft or loss, and the necessity to supervise, all of which entered into decisions concerning the form or structure of the tri-partite relationship, but viewed as an economic reality, the position of Checkrite in this relationship is almost identical to that of a jobber, who has a captive group of station operators pledged to it by contract to sell whatever brand of motor fuel it designates, and who supplies the captive operators with the product which it in turn buys from the refiner. Clearly such a jobber is protected by the PMPA; the differences in legal form between Checkrite's operation and that of the typical or traditional petroleum jobber bears no direct relationship to the economic realities. The economic realities make Checkrite a jobber.

The power to demand that the station operators cease using Amoco products and to change the colors of their stations to another brand gives Checkrite a power which in law and economic theory is generally held by the station operator or dealer himself. What has happened is that such a significant part of the economic rights and powers of the dealers has been withheld by Checkrite from the station operators, that Checkrite fits within the purpose of the PMPA as an independent entrepreneur whom Congress thought worthy of protection against unjustified termination; therefore Checkrite is a franchisee within the purpose of the statute.

Memorandum and Order of United States District Court Dated June 15, 1981

Accordingly, the defendant's motion to dismiss is denied.

The Court's consideration of the matter suggests that plaintiff Checkrite is entitled to summary judgment in its favor. The Court is concerned, however, that there may be additional documents or factual information which either or both parties may require to have in the Court record prior to departure on an uncharted journey to the (allegedly) Temporary Emergency Court of Appeals. This journey they certainly must take, as this is a case of first impression involving statutory construction of a most significant sort.[3] Accordingly, the Court directs that a conference take place on June 25, 1981 at 4:00 P.M. in Courtroom 705, at which time this Court will examine and consider whether additional proof by way of document or testimony must be taken, and will make a final determination whether summary judgment should be granted to plaintiff based on the reasoning and analysis set forth hereinabove.

The Court now grants the preliminary injunction as requested, pursuant to 15 U.S.C. §2805(b), which provides in relevant part:

> "(b)(1) In any action under subsection (a), the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.
>
> (2) Except as provided in paragraph (3), in any action under subsection (a), the court shall grant a preliminary injunction if—

Memorandum and Order of United States District Court Dated June 15, 1981

(A) the franchisee shows—

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief."

The Court finds, pursuant to §2805(b), *supra*, that Checkrite has shown that a franchise relationship between it and Amoco has not been renewed by Amoco, and that in so doing, Amoco has not complied with the PMPA, as Amoco concedes. Because the franchise agreement between Amoco and Checkrite lapsed by its terms on May 30, 1981, a preliminary injunction is necessary to prevents hardship to Checkrite. The balance of hardships tips in favor of Checkrite because in the absence of injunctive relief, Checkrite would be obliged to designate another oil company to

sell fuel to its operators, which may be impossible, and in any event would disrupt the operation of the service stations severely. In contrast, injunctive relief merely maintains the status quo, with Amoco delivering and selling motor fuel to the operators and Checkrite receiving commissions, pending the final disposition of this case.

Counsel for the parties are directed to confer with each other in an effort to agree upon the amount of an adequate bond or security which would protect the interests of Amoco with respect to the injunction.

The foregoing constitutes findings and conclusions, based on the submitted documents and the transcript of hearing on May 19, 1981, for purposes of Rule 65, F.R.Civ.P., to the extent applicable to this case, and pursuant to 15 U.S.C. §2805(b).

Settle an Injunction in writing on five (5) days actual notice.

So Ordered.

Dated: New York, New York
June 15, 1981

CHARLES L. BRIEANT
U.S.D.J.

Memorandum and Order of United States District Court Dated June 15, 1981

1. H.R. 130, comprising titles I and II of the PMPA, was passed by the House of Representatives on April 5, 1977, 123 Cong. Rec. _____, H 3019. An amended version of H.R. 130, which added title III and contained amendments to title I of the PMPA was passed by the Senate on May 9, 1978. 124 Cong. Rec. _____, S 7158. The House adopted the Senate's amended version of the PMPA on June 6, 1978. 124 Cong. Rec. _____, H 5003.

2. In addition, neither party explains the effect, if any, of the following provision contained in the agreement between Amoco and Checkrite:

> "17. It is mutually agreed between the parties that the Amoco Dealer Sales Agreements cited in Paragraph 1 hereof, shall contained [sic] the following clause:
>
> 'This Agreement shall terminate automatically in the event that the Agreement of _____ 19____, between Amoco and *Checkrite Petroleum Corp.* as same may be extended or modified, is terminated for any reason.'
>
> at the time said contract is delivered to Amoco pursuant to the terms hereof."

However, a contract between Amoco and one of the eleven operators, annexed to Amoco's notice of motion to dismiss, does not appear to contain this clause. See, Amoco Oil Company Dealer Agreement with Mike Rodriguez, effective June 18, 1979 to June 1, 1980, submitted with motion papers. Since Checkrite upon termination by Amoco will lose its share of the total economic

benefit of the tri-partite relationship, it may be expected to and indeed would seem to be compelled to order the station operators to stop serving Amoco product and take their motor fuel from another source. Only by doing so could Checkrite gain a benefit of its "control" of the colors of the stations it leases to the operators.

3. This Court finds the instant case distinguishable from *Mel-Bern Service Center No. 6 Corp. v. Tartan Oil Corp., et al.*, 78 CV 107 (E.D.N.Y. April 6, 1979, Pratt, D.J.), cited by Amoco. In that case, the court held that when the defendant "broker" reduced commissions to plaintiff retailers, it did not violate Subpart "F" of the regulations of the Federal Energy Agency ("FEA") (now the Department of Energy), 10 C.F.R. §§212.92 and 212.93. the court, relying on FEA Interpretation 1974-12, followed in *New York Metropolitan Petroleum Jobbers Committee*, 1 FEA ¶ 20,175 (November 7, 1974), held that the defendant was not a reseller, reseller-retailer, or a retailer under the relevant regulations. The instant case does not involve an interpretation of the regulations at issue in *Mel-Bern*, nor an interpretation of the word "reseller."

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT DATED SEPTEMBER 9, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 2541-CLB

CHECKRITE PETROLEUM, INC.,

Plaintiff,

-against-

AMOCO OIL COMPANY,

Defendant.

Brieant, J.

Familiarity is assumed with this Court's Memorandum Decision and Order dated June 15, 1981 in this action. That Memorandum contains findings and conclusions based on submitted documents and the transcript of a hearing held May 19, 1981, and resulted in a preliminary injunction being granted in favor of plaintiff ("Checkrite") against defendant ("Amoco").

The case presented a question apparently of first impression in this Court; whether plaintiff, a so-called "broker" is protected from termination without cause as a "franchisee" under the Petroleum Market Practices Act ("PMPA"), 15 U.S.C. §§2801, *et seq.* Based on the documentation then available, this Court concluded that the plaintiff was protected by the statute for the reasons therein set forth, as a franchisee or distributor.

Memorandum and Order of the United States District Court Dated September 9, 1981

No formal injunction order was ever issued. Although a proposed preliminary injunction order and a proposed counter order were submitted on notice returnable June 22, 1981, no order was signed pending further inquiry as to whether a final judgment could issue in the matter. In the meantime Amoco agreed to and did, maintain the *status quo* insofar as concerns continued supply to the Checkrite stations.

The Court held in its June 15, 1981 Memorandum (p. 17) as follows:

> "The Court's consideration of the matter suggests that plaintiff Checkrite is entitled to summary judgment in its favor. The Court is concerned, however, that there may be additional documents or factual information which either or both parties may require to have in the Court record prior to [appeal], as this is a case of first impression involving statutory construction of a most significant sort. [Footnote omitted]. Accordingly, the Court directs that a conference take place . . . at which this Court will examine and consider whether additional proof by way of document or testimony must be taken, and will make a final determination whether summary judgment should be granted to plaintiff based on the reasoning and analysis set forth hereinabove."

Thereafter, further documents, affidavits and memoranda have been submitted, and a further hearing was held. These post-hearing submissions have been somewhat confusing, and there

has been difficulty ascertaining the scope and significance of plaintiff's documentation. However, finally, on September 8, 1981, the matter was fully submitted.

I now find that there is no genuine issue of fact which prevents final resolution of the issue in favor of the plaintiff as to those locations or retail outlets where the documentation supports the theory upon which plaintiffs prevailed in the June 15th Memorandum Decision. There are distinct factual variances as between different locations or stations, the effect of which is discussed below. The numbers refer to account numbers maintained by Amoco:

No. 13131 at Wyandanch. As to this station, which is apparently now closed temporarily, Checkrite has not produced any lease or document by which, within the rationale of the Court's June 15, 1981 decision, it controls the choice of brand for this outlet. A so-called "461 Agreement," which Amoco has with Leroy Baldwin, does provide, however, that it expires if the agreement between Checkrite and Amoco expires.

The Court concludes that the references to such a Checkrite agreement in Amoco's own dealership agreement is sufficient to supply the omission as to this outlet, and that plaintiff is entitled to summary judgment granting permanent injunctive relief as to the Wyandanch station.

No. 12972 at Farmingdale. The lease on this station, received in evidence as Pltf's Ex. 1 at the hearing on September 8, 1981, contains a clause typed as Paragraph No. 38 in the typewritten addendum to a printed form of lease, to the effect that "this contract constitutes as [sic] the whole agreement between the

parties. There are no promises, terms, obligations, covenants or conditions other than contained herein. No variations hereof shall be deemed valid unless signed by the parties with the same formalities as this contract." This lease is with Shaemark Industries, Inc., as tenant, and was executed by Checkrite as landlord. It contains no clause granting Checkrite the power to control the brand of product sold. This lease shows that Checkrite is the assignee of a paramount lease dated May 17, 1968. In view of the integration clause, and the failure to present any document which compels Shaemark or its successor or operator to comply with Checkrite's designation of the brand of product to be sold there, there is a failure of proof as to this location, within the rationale of this Court's prior decision. As to this location, Amoco is entitled to summary judgment in its favor and plaintiff is entitled to no relief.

No. 12766 at Hauppauge. Here the dealer is operating under a lease which has expired, and has been treated by the dealer and Checkrite as a month-to-month tenant. Under New York law, a tenant who holds over following the expiration of his lease and who is treated as a month-to-month tenant by the landlord is presumed in the absence of evidence to the contrary to hold on the same terms and conditions as existed in the expired written lease. *Church v. Doe*, 234 N.Y.S. 2d 522, 525 (1962). There is no showing that this is not the case with respect to the Hauppauge location. The Court finds the evidence sufficient as to the Hauppauge location to permit a finding that Checkrite retains the power to designate the brand and so long as the month-to-month tenancy continues, the Court regards the provision in the expired lease which allows Checkrite to control the brand as remaining in full force and effect. Plaintiff is entitled to summary judgment as to this location.

Memorandum and Order of the United States District Court Dated September 9, 1981

No. 12802 at Lake Ronkonkoma. This location differs only in that the landlord is not Checkrite, but "The Wisser Company, Inc.," a sister corporation also controlled by Mr. Wisser, who is the principal of Checkrite. For purposes of this action the Lake Ronkonkoma property comes within the theory of the case, and I conclude that through control of the location by its sister corporation Checkrite controls the brand of product sold there, as it represented it did in its agreement with Amoco.

As to five of the eleven stations, Checkrite produced no leases of the sort which were represented to exist at the time of the preliminary injunction hearing. It now appears that these respective dealers or their affilitates own these stations outright. Checkrite showed "primary gasoline and motor oil agreements" on a traditional one-page printed form generally used by jobbers and other suppliers of petroleum products. These identical agreements purport to be for the "sale and delivery" by Checkrite of all of the operators' requirements with respect to the station, and purport to provide for f.o.b. gasoline sales at "seller's [Checkrite's] posted dealer prices" and specify terms of payment. They do restrict the buyer to the sale of "seller's" gasoline. Use of this form of agreement is anomolous to say the least, because Checkrite has never bought or sold motor fuel, or made deliveries, and has no posted dealer prices. There is no provision in the agreements for assignment by Checkrite, or designation by Checkrite of another as seller to perform the supply side of the agreement. The documents do not fit the facts, they do not comply with the apparent intentions of the three parties at the time they were executed, and are arguably inconsistent with the agreement Checkrite has with Amoco, pursuant to which they were generated by Checkrite.

Memorandum and Order of the United States District Court Dated September 9, 1981

It now appears that Checkrite has no ownership interest, because all five of these "primary agreement" stations are owned by the Amoco dealers themselves. Defendant argues from this (Memorandum docketed August 26, 1981, p. 8) that "hence Checkrite is evidently in no position to require these stations to change brands . . . and these stations do not come within the standard established by the Court."

The Court does not agree. As is often the case in matters attended to by businessmen, the agreements are inartistically drawn. It would seem apparent from the agreement between Checkrite and Amoco that the parties, or at least Checkrite, thought that these agreements were adequate to allow Checkrite to control the brand of petroleum products dispensed at these five stations and to change the brand from time to time if so advised. To the extent that these "primary agreements" are in effect, and are being honored by the operators, I do not believe that Amoco is in a position at this late date to challenge the adequacy of Checkrite's documentation, or the validity of its power to compel performance of the Checkrite-Amoco agreement by self-owned stations, or alternatively to challenge Checkrite's ability to delegate performance of these "primary agreements" on its part to someone else such as Amoco. While these five stations continue to dispense Amoco products, and are bound to Checkrite as a "supplier," the Court believes that Checkrite is entitled to permanent injunctive relief as to them. This conclusion flows from the practical construction of these agreements for various lengthy periods by the parties themselves. The operators have been dealing directly with Amoco under a written agreement by which Checkrite was their supplier, and until it concluded to end its agreement with Checkrite, Amoco never contended that Checkrite had not performed its contract obligation to Amoco, to "control" these outlets.

Memorandum and Order of the United States District Court Dated September 9, 1981

In this connection the Court notes that No. 12817 at Northport is said to be "in the process of converting to Chevron, a competing brand." If this is true, of course the claim for an injunction is moot. If such a conversion is being made with the acquiecence of Checkrite, it is some evidence either that Checkrite is about to breach its duty to Amoco, or some evidence that its documentation is ineffectual to create the relationship with the operator which Checkrite now claims it intended to create, and which its agreement with Amoco represents and confirms that it had. But unless and until any of these five stations reject Amoco and get away with it, I conclude that Checkrite is entitled to continue to perform, and to receive injunctive relief. If such performance ceases, Amoco may treat it as a breach, and a cause for termination after notice, pursuant to §105 of the PMPA, a possibility which is noted, but upon which this Court expresses no opinion.

It is also suggested by Amoco that one or more of the stations may have been buying gasoline from another supplier and passing it off to the public as Amoco's product. If this is so, nothing directed by this Court derogates in any way from Amoco's rights to whatever relief the law allows, including cancellation of the franchise for that location, on notice, pursuant to §105 of the PMPA, with a statement of reasons. This is exactly the procedure which Amoco has refused to follow with respect to Checkrite, and that failure is the basis for this lawsuit, Nothing contained herein or in the June 15th opinion is or was intended to limit Amoco's right to proceed in accordance with the statute where grounds for termination are said to exist.

This Court adheres to its prior legal conclusions in the matter, and concludes that Checkrite is entitled to a final judgment

granting declaratory and permanent injunctive relief and enjoining termination without prior notice and compliance with §105 of the PMPA, as to those stations, other than the location No. 12972 at Farmingdale.

The Court finds no basis for a damage action here. The supply was not interrupted because of intervention by the Court, and there is no evidence of any violation of the PMPA in this case which caused monetary damage to Checkrite. The Court concludes also that there is no basis for punitive damages or an award of attorneys' fees. The matter was disposed of on motion without undue cost. This litigation presents a close case. The reasonableness of Amoco's reliance on its interpretation of the statutory language is inconsistent with any bad purpose of the sort which would evoke punitive damages.

Settle a final judgment in accordance with the foregoing. Such judgment should be presented to the Court on ten (10) days notice of settlement, and should be filed promptly.

So Ordered.

Dated: New York, New York
September 9, 1981

CHARLES L. BRIEANT
Charles L. Brieant
U. S. D. J.

ORDER AND JUDGMENT OF THE DISTRICT COURT DATED OCTOBER 6, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 2541 (CLB)

CHECKRITE PETROLEUM, INC.,

Plaintiff,

-against-

AMOCO OIL COMPANY,

Defendant.

Plaintiff having moved this Court by Order to Show Cause for an injunction under the Petroleum Marketing Practices Act ("PMPA") §105(b), and defendant having cross moved to dismiss the complaint and for summary judgment on the ground that plaintiff is not covered by the PMPA and that the complaint does not state a claim upon which relief can be granted:

NOW, upon all the papers filed in support of and in opposition to the motions, and the motions having been duly submitted and due deliberation having been had thereon, it is

ORDERED ADJUDGED AND DECREED; that the motions of defendant to dismiss the complaint and for summary judgment are denied except with respect to a service station located in Farmingdale, as to which defendant's motion is granted, and it is further

Order and Judgment of the District Court Dated October 6, 1981

ORDERED that the motion of plaintiff for a permanent injunction is granted to the extent that defendant is enjoined from terminating and is thereby obligated to continue to perform the Agreement dated March 31, 1976, and to pay commissions to plaintiff as provided therein, except as to the service station located in Farmingdale and except that defendant is not enjoined from future termination or non-renewal of plaintiff or any of the dealers operating service stations referred to in the complaint and the exhibits thereto upon proper notice and compliance with §105 of the PMPA, and it is further

ORDERED that plaintiff's claims for compensatory damages, punitive damages and attorneys' fees are denied.

Dated: New York, New York
October 6, 1981

s/ Charles L. Brieant
U.S.D.J.

Judgment entered 10/7/81

s/ Raymond F. Burghardt
Clerk

MEMORANDUM AND ORDER OF THE DISTRICT COURT DATED OCTOBER 15, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 2541-CLB

CHECKRITE PETROLEUM, INC.,

Plaintiff,

-against-

AMOCO OIL COMPANY,

Defendant.

Brieant, J.

On October 6, 1981 a judgment was entered in this action in the form proposed by the attorneys for defendant and submitted to this Court pursuant to notice of settlement returnable on that date. At the time that the judgment submitted by defendant was signed, the Court was not in possession of three (3) proposed judgments prepared and served by the attorney for plaintiff. These did not reach the Court until October 13, 1981.

The Court has examined the three proposed judgments submitted by plaintiff's attorney and received October 13, 1981. These were accompanied by a hand-written note reading as follows: "I desire Judgment #1. If I cannot have Judgment #1 then may I have #2. If not #1 or #2 then #3."

The Court believes that the judgment as signed on October 6, 1981 comports with the decision directing its submission.

Memorandum and Order of the District Court Dated October 15, 1981

Treating the plaintiff's submissions referred to above as an application to vacate or resettle the form of the judgment, the application is denied.

Plaintiff by a separate memorandum also seeks reargument and reconsideration of the prior determination of the Court with respect to legal fees and monetary damages. Reargument is granted. The Court on reargument adheres to its prior conclusion that plaintiff suffered no monetary damages cognizable in this litigation, and proved none.

With respect to legal fees, the position of plaintiff appears to be well taken, and on further reflection, the Court believes plaintiff should recover its reasonable and necessary attorneys fees. There is no present record before this Court which would justify a factual finding as to the number of hours reasonably consumed in rendering the legal services. Unless the time charges can be stipulated or agreed to, they must be the subject of an evidentiary hearing, to be held following presentation of a detailed affidavit. The memorandum received October 13, 1981 in support of the motion to reargue also points out that in addition to legal services already rendered, plaintiff will be required to incur additional legal fees for services subsequent to the entry of judgment in this Court. The Court now concludes on reargument as a matter of discretion, that plaintiff is entitled under the statute to its reasonable attorneys fees.

This Court continues to hold the view that this litigation presents a close case. Little purpose would be served in adjudicating the amount of the legal fees at this time when the total legal services have not been concluded in the matter, and while there remains no evidentiary record (or stipulation in lieu of an evidentiary

record) which would permit a factual finding as to the reasonable value of the services. The interests of justice would be served by a prompt resolution of the inevitable appeal of the substantive issues already decided.

On reargument the prior Memorandum and Order dated September 9, 1981 is modified accordingly, and the final judgment of this Court docketed October 7, 1981 is also modified to add the following provision in lieu of the last paragraph thereof, which shall now read as follows:

> "ORDERED AND ADJUDGED that plaintiff's claims for compensatory damages and punitive damages are denied; and it is further
>
> ORDERED AND ADJUDGED that plaintiff is entitled to a reasonable attorney's fee for services rendered and to be rendered in this litigation. That issue is severed and jurisdiction is reserved in this Court to adjudicate the amount thereof after a hearing upon notice. Application may be made for the fee at the foot of this judgment following appellate finality, in the event that plaintiff prevails on appeal.
>
> The Court finds no just cause for delay and directs that this judgment shall be a final judgment as to all issues herein decided, pursuant to Rule 54(b), F.R.Civ.P."

So Ordered.

Memorandum and Order of the District Court Dated October 15, 1981

Dated: New York, New York
October 15, 1981

CHARLES L. BRIEANT
Charles L. Brieant
U. S. D. J.

AMENDED JUDGMENT OF THE DISTRICT COURT DATED OCTOBER 20, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 2541-CLB

CHECKRITE PETROLEUM, INC.,

Plaintiff,

-against-

AMOCO OIL COMPANY,

Defendant.

Plaintiff having moved this Court by Order to Show Cause for an injunction under the Petroleum Marketing Practices Act ("PMPA") §105(b), and defendant having cross moved to dismiss the complaint and for summary judgment on the ground that plaintiff is not covered by the PMPA and that the complaint does not state a claim upon which relief can be granted:

NOW, upon all the papers filed in support of and in opposition to the motions, and the motions having been duly submitted and due deliberation having been had thereon, and plaintiff having moved for reargument; it is

ADJUDGED AND DECREED, that the motions of defendant to dismiss the complaint and for summary judgment are denied except with respect to a service station located in Farmingdale, as to which defendant's motion is granted; and it is further

Amended Judgment of the District Court Dated October 20, 1981

ADJUDGED AND DECREED, that defendant is permanently enjoined from terminating and is hereby obligated to continue to perform the Agreement dated March 31, 1976, and to pay commissions to plaintiff as provided therein, except as to the service station located in Farmingdale and except that defendant is not enjoined from future termination or non-renewal of plaintiff or any of the dealers operating service stations referred to in the complaint and the exhibits thereto upon proper notice and compliance with §105 of the PMPA; and it is further

ADJUDGED AND DECREED that plaintiff's claims for compensatory damages and punitive damages are denied; and it is further

ADJUDGED AND DECREED that plaintiff is entitled to a reasonable attorney's fee for services rendered and to be rendered in this litigation. That issue is severed and jurisdiction is reserved in this Court to adjudicate the amount thereof after a hearing upon notice. Application may be made for the fee at the foot of this judgment following appellate finality, in the event that plaintiff prevails on appeal.

The Court finds no just cause for delay and directs that this Judgment shall be a final judgment as to all issues herein decided, pursuant to Rule 54(b), F.R.Civ.P.

Dated: New York, New York
October 20, 1981

CHARLES L. BRIEANT
Charles L. Brieant
U. S. D. J.

PETROLEUM MARKETING PRACTICES ACT, 15 U.S.C. §2801

PUBLIC LAW 95-297—JUNE 19, 1978

An Act

To provide for the protection of franchised distributors and retailers of motor fuel and to encourage conservation of automotive gasoline and competition in the marketing of such gasoline by requiring that information regarding the octane rating of automotive gasoline be disclosed to consumers.

Be it enacted by the Senate and House of Representatives of the United States of America Congress assembled, That this Act may be cited as the "Petroleum Marketing Practices Act".

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TITLE I—FRANCHISE PROTECTION

Definitions

Sec. 101. As used in this title:

(1)(A) The term "franchise" means any contract—

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which

supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes—

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed—

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who—

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include—

(A) any failure which is only technical or unimportant to the franchise relationship; or

(B) any failure for a cause beyond the reasonable control of the franchisee.

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship—

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after the date of enactment of this Act) of the relevant franchise which was entered into prior to such date of enactment and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce—

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

Petroleum Marketing Practices Act

FRANCHISE RELATIONSHIP; TERMINATION AND NONRENEWAL

Sec. 102.(a) Except as provided in subsection (b) and section 103, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may—

(1) terminate any franchise (entered into or renewed on or after the date of enactment of this Act) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b)(1) Any franchisor may terminate any franchise (entered into or renewed on or after the date of enactment of this Act) or may fail to renew any franchise relationship, if—

(A) the notification requirements of section 104 are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both

reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(a); or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1).

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if—

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 104.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(a); or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1).

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if—

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of non-renewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise:

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 104(d); and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to the date of the enactment of this Act and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect

to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if—

(i) such determination—

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises—

(I) the franchisor, during the 180-day period after notification was given pursuant to section 104, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if—

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer

complaints by the franchisor concerning the franchisee's operation of the marketing premises, if—

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to the date of the enactment of this Act (the unexpired term of which, on such date of enactment, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if—

(i) such determination is—

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 104, either—

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

(c) As used in subsection (b)(2)(C), the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as—

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise—

(A) of the duration of the underlying lease, and

(B) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for—

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

(d) In the case of any termination of a franchise (entered into or renewed on or after the date of enactment of this Act), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed)—

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5), the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

TRIAL FRANCHISES AND INTERIM FRANCHISES; NONRENEWAL

Sec. 103.(a) The provisions of section 102 shall not apply to the nonrenewal of any franchise relationship—

(1) under a trial franchise; or

(2) under an interim franchise.

(b) For purposes of this section—

(1) The term "trial franchise" means any franchise—

(A) which is entered into on or after the date of enactment of this Act;

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously—

(i) that the franchise is a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 104, of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 102, limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent

authorized by the provisions of the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise—

(A) which is entered into on or after the date of the enactment of this Act;

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal—

(i) was based upon a determination described in section 102(b)(2)(E), and

(ii) the requirements of section 102(b)(2)(E) were satisfied; and

(D) which is in writing and states clearly and conspicuously—

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 102(b)(2)(E)(ii) and (iii) are satisfied.

(c) If the notification requirements of section 104 are met, any franchisor may fail to renew any franchise relationship—

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if—

(A) such nonrenewal is based upon a determination described in section 102(b)(2)(E); and

(B) the requirements of section 102(b)(2)(E) (ii) and (iii) are satisfied.

NOTIFICATION OF TERMINATION OR NONRENEWAL

Sec. 104. (a) Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to

the franchisee who is a party to such franchise or such franchise relationship—

(1) in the manner described in subsection (c); and

(2) except as provided in subsection (b), not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

(b)(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2)—

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor—

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins—

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 102(b)(2)(E) or section 103(c)(2), the franchisor shall—

(A) furnish notification to the franchisee not less than 180 days prior to the date on which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

(c) Notification under this section—

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain—

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d).

(d)(1) Not later than 30 days after the date of enactment of this Act, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this title, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this title.

(2) In the case of summaries required to be furnished under the provisions of section 102(b)(2)(D) or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

ENFORCEMENT

Sec. 105. (a) If a franchisor fails to comply with the requirements of section 102 or 103, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of—

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 102 or 103.

(b)(1) In any action under subsection (a), the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 102 or 103, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a), the court shall grant a preliminary injunction if—

(A) the franchisee shows—

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a), the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced—

(A) more than 90 days after the date on which notification pursuant to section 104(a) was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 104(b)(2) was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 104(b)(1).

(c) In any action under subsection (a), the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 102(b) or 103, and, if applicable, that such franchisor complied with the requirements of section 102(d).

(d)(1) If the franchisee prevails in any action under subsection (a), such franchisee shall be entitled—

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard

of the requirements of section 102 or 103, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a), the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

(e)(1) In any action under subsection (a) with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 102, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that—

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business—

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 104 have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) if such nonrenewal is prohibited by section 102.

RELATIONSHIP OF THIS TITLE TO STATE LAW

Sec. 106. (a) To the extent that any provision of this title applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any

violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this title.

(b) Nothing in this title authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

Office - Supreme Court, U.S.
FILED
JUL 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHECKRITE PETROLEUM, INC.,

Petitioner,

—v.—

AMOCO OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Questions Presented

1. The Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.* (Supp. IV 1980) (hereinafter "PMPA"), (Pet. App. 49a-75a),* protects persons who purchase motor fuel or receive motor fuel on consignment from non-renewal without cause of their franchise agreements with motor fuel refiners. (15 U.S.C. § 2802). Can petitioner Checkrite Petroleum Inc. ("Checkrite"), a company which neither purchases motor fuel nor takes it on consignment, require renewal under the PMPA of an agreement with respondent-refiner Amoco Oil Company ("Amoco"), whereby Checkrite receives commissions from Amoco on gasoline sales made at service stations for which Checkrite served as Amoco's broker or finder?

2. Can Checkrite, a party with no authority or permission to use Amoco's trademark, invoke the PMPA restrictions on non-renewal of motor fuel franchises when that statute applies by its terms only to persons "authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel" [28 U.S.C. § 2801(4)]?**

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* References to pages of the petition are denoted by "Pet.", to pages of the petitioner's appendix by "Pet. App.", to pages of the brief in opposition by "Resp." and to pages of the appendix to the brief in opposition by "Resp. App.".

** Pursuant to this Court's Rule 28.1, respondent Amoco Oil Company states that its owner and parent company is Standard Oil Company (Indiana). Amoco Oil Company has an interest in the following companies which are not wholly owned by Amoco:

Amoco Canada Petroleum Co., Ltd.
Amoco Credit Corporation
Amoco Oil Holdings A.A.
Amoco Pipeline Company
Analog Devices
Cetus Corporation
Cypress Mines Corporation
Amoco (U.K.) Exploration Company
Cypress Anvil Mining Corporation
Solarex Corporation

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2255

CHECKRITE PETROLEUM, INC.,

Petitioner,

—v.—

AMOCO OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Statement of the Case

This action was commenced by Checkrite in the United States District Court for the Southern District of New York by order to show cause seeking to preliminarily enjoin the expiration or non-renewal of Checkrite's contract with Amoco. Checkrite alleged in its complaint that it was entitled to the relief sought under those provisions of the PMPA which prevent a motor fuel franchisor from failing to renew a franchise in the absence of specific grounds enumerated in the statute and unless there is compliance with statutorily mandated notification procedures.* 28 U.S.C. § 2802.

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* There is no dispute that Amoco did not satisfy the PMPA termination requirements since it was Amoco's position that the Act does not apply to Checkrite.

The Checkrite-Amoco contract provided for payment by Amoco to Checkrite of commissions on gasoline sales made at service stations for which Checkrite had served as Amoco's broker or finder. The contract was entered on March 30, 1976 and was scheduled to expire by its terms on May 30, 1981, one month after service of the order to show cause. The PMPA became effective in June of 1978 during the pendency of the parties' contract.

The primary issue in this case centers on the provisions of the PMPA which define those persons or franchisees who are entitled to invoke the statutory restrictions on non-renewal of their franchises. By the plain language of the PMPA, those restrictions inure only to the benefit of persons who purchase motor fuel or who receive motor fuel on consignment. The undisputed fact is that Checkrite does neither. The Second Circuit's determination that the PMPA does not apply to the contract between Checkrite and Amoco (Pet. App. 2a), is thus eminently correct.

Even if Checkrite could meet this threshold statutory requirement, there is a separate equally dispositive reason why the PMPA does not govern the Amoco-Checkrite relationship. The statutory restrictions apply only in favor of persons who are "authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel." 15 U.S.C. § 2801 (1), (4). It is undisputed that the Checkrite-Amoco agreement made no provision whatsoever concerning use of Amoco's trademark, a fact which is not surprising since Checkrite neither purchased nor sold Amoco gasoline. This fact alone precludes application of the PMPA in this case.

Actions of the District Court

On the return date of Checkrite's preliminary injunction motion, Amoco cross-moved to dismiss the complaint

on grounds that Checkrite did not and could not allege the threshold requirement of the statute—that it had purchased motor fuel from Amoco or had received it on consignment. The District Court agreed that no such showing could be made (Pet. App. 19a), but issued an injunction and denied Amoco's motion to dismiss on grounds that Checkrite qualified nonetheless as a franchisee entitled to require renewal of its franchise under the PMPA. The District Court concluded that the legislative history indicated a Congressional intent to "accord broad protection to persons 'marketing' branded fuels" regardless of whether those persons met the requirements set forth in the plain language of the Act (Pet. App. 22a).

Expressing an inclination to grant summary judgment to Checkrite, the District Court scheduled a conference to permit the parties to submit additional proof before finally determining whether to do so (Pet. App. 28a). Amoco then moved for summary judgment on grounds that even if the District Court's interpretation of the PMPA was correct, there was no proof that Checkrite met the Court's enunciated standard as a marketer of fuels entitled to invoke the Act. In a second memorandum and order, the District Court denied Amoco's summary judgment motion and permanently enjoined it from terminating the Checkrite-Amoco agreement as to all but one service station (Pet. App. 33a-40a).

The Decision of the Second Circuit

The Second Circuit reversed the judgment of the District Court and directed dismissal of the complaint, holding that the PMPA does not apply to the relationship between Amoco and Checkrite (Pet. App. 2a). The rationale was that Checkrite does not come within the plain terms of the PMPA because it neither purchases motor fuel nor takes

motor fuel on consignment from Amoco (Pet. App. 5a). The Court found no reason to look beyond the plain statutory language for expressions of legislative intent and determined that even in so doing, there was no support for the District Court's conclusion that Congress intended to cover a broad class of persons engaged in marketing branded motor fuel regardless of whether those persons were purchasers or consignees (Pet. App. 5a-6a).

The Amoco-Checkrite Agreement

The Amoco-Checkrite agreement was designated by the parties as a "Broker-Contract" and refers to Checkrite throughout as the "Broker" (copy of the Amoco-Checkrite agreement annexed in Resp. App. 1a-10a). Under that agreement, Checkrite represented to Amoco that there were fully equipped and operating service stations (listed on an annexed contract schedule) which were leased to or owned by retail dealers wholly separate from Checkrite (Resp. App. 2a). Checkrite was free to bring new dealers to Amoco but Amoco had the "sole option" to accept or reject new accounts (Resp. App. 2a). The agreement provided that the Broker would cause the dealers to execute Dealer Sales Agreements with Amoco but would not participate in any way in the operation of the stations and would forfeit commissions for any station where the Broker became the retail dealer (Resp. App. 2a, 8a). The agreement nowhere provides for transfer of any kind by Amoco to Checkrite of motor fuel products (*see* Resp. App. 2a-10a), and it is the conceded fact that Checkrite does not buy or sell any Amoco gasoline, takes none on consignment, and does not order, store, or deliver any gasoline sold by Amoco to any dealers. Thus, Checkrite's assertion in its Petition to this Court that it is an important "arm in the distribution process, and a co-distributor with Amoco, in

short, a distributor in fact and function" (Pet. 11; *see* Pet. 7, 10), is totally inaccurate.*

Amoco agreed to pay Checkrite a commission of 1.9 cents for each gallon of gasoline sold and delivered by Amoco to the dealers and 10% of the dollar volume of motor oil delivered to the same dealers (Resp. App. 3a).

The Broker contract contains no provision whatsoever about the use of Amoco's trademark by Checkrite (*see* Resp. App. 2a-10a).

Amoco's Agreements with the Dealers

The Dealer Agreements which Amoco entered with the dealers brought to it by Checkrite provide for sale and delivery by Amoco of gasoline and diesel fuel to the dealers at Amoco's standard tank wagon prices (copy of a Dealer Agreement with one of the dealers brought to Amoco by Checkrite annexed in Resp. App. 11a-16a). The Dealers are responsible for payment (Resp. App. 13a). The same agreement sets forth terms and conditions for use of Amoco's trademark by the dealers, who are expressly permitted to sell other brands of gasoline as long as Amoco's trademark is not infringed (Resp. App. 14a-15a, 12a).

Summary of Argument

There is no conflict between the Second Circuit's decision in this case and the decision of any court. *Central Hanover Bank & Trust Co.* v. *Commissioner of Internal Revenue*, 159 F.2d 167 (2d Cir.), *cert. denied*, 331 U.S. 836 (1947) merely enunciates the general principle that statu-

* Checkrite repeatedly refers to its "supply" agreements with the dealers which it brought to Amoco (Pet. 4, 5, 6, 16). Checkrite never supplied any retail dealers with Amoco product since, of course, Checkrite had no such supply.

tory construction requires consideration of the intent of the legislation as a whole, a principle which is totally consistent with the Second Circuit's decision in this case (Resp. 7).

The Second Circuit's decision here, a direct application of plain statutory language to undisputed facts, presents no important question of federal law which should be settled by this Court. Counsel for Amoco know of no other pending cases which raise the issue presented here (Resp. 7-8).

The Second Circuit correctly decided the issues raised by this case. Checkrite cannot require renewal of its agreement with Amoco under the PMPA because Checkrite neither purchases motor fuel nor takes it on consignment and has no permission or authorization to use Amoco's trademark (Resp. 8-11).

The Second Circuit correctly rejected the unprecedented standard for PMPA eligibility fashioned by the District Court. In any event, Checkrite wholly failed to prove that it meets that standard (Resp. 11-12).

Reasons for Denying the Writ

1. The Second Circuit Decision Does Not Conflict With the Decision of Any Court and Presents No Important Questions of Federal Law Which Should Be Settled by This Court

The decision of the Second Circuit Court of Appeals in this case is a straightforward application of the plain language of the PMPA to undisputed facts concerning Checkrite's relationship to Amoco.

Checkrite does not contend, as indeed it cannot, that this decision conflicts with the decision of any other federal

court. Nor is there present here any intra-Circuit conflict as Checkrite erroneously contends (Pet. i, 12).

Checkrite cites as the allegedly conflicting Second Circuit decision, *Central Hanover Bank & Trust Co.* v. *Commissioner of Internal Revenue*, 159 F.2d 167 (2d Cir.), *cert. denied*, 331 U.S. 836 (1947), a case where the Second Circuit was called upon to construe a complicated provision of the Internal Revenue Code governing inclusion of assets in a decedent's estate. The determination of the *Central Hanover* Court which is claimed to conflict with the present case is quoted at page 20a of the Petition before this Court. The quoted language merely states the established general principle that a Court engaged in statutory construction should consider along with the plain words of a statute, the purpose or object intended by the statutory scheme as a whole. Even a cursory reading of the Second Circuit decision here reveals that there is no conflict whatsoever with the rule enunciated in the *Central Hanover* case.

Nor is there any merit to petitioner's contention that this case presents an important question of Federal law which should be settled by this Court (Pet. 12). Checkrite relies on the fact that no other Court has considered whether a broker such as Checkrite comes within the PMPA definition of "franchisee." In the context of this case, that fact militates against issuance of a writ of certiorari rather than in its favor. The Second Circuit's indisputably correct application of the clear statutory language to the undisputed facts of this case stands uncontradicted and it is unlikely that any other court will reach a different result. Counsel for Amoco know of no other pending or threatened actions raising the issue of PMPA applicability to the relationship between a refiner and a broker or commission agent.

2. The Second Circuit Fully Considered and Correctly Decided the Issues Presented by This Case

Checkrite's primary argument in support of its Petition to this Court is that the Second Circuit failed to consider the intent of Congress in enacting the PMPA (Pet. 13-17). This argument is unavailing.

The Second Circuit correctly held that the legislative intent behind the statutory provisions in issue in this case can be fully and fairly gleaned from the plain and unambiguous language of the statute itself (Pet. App. 5a-6a). *E.g., United States* v. *Brown*, 555 F.2d 407, 415n. (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (when a statute is plain on its face recourse to legislative history is unnecessary). *See Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.")

Moreover, there are ample grounds for the Second Circuit's determination that the legislative history, which Checkrite argues was erroneously overlooked, wholly fails to support the conclusion that Checkrite is a protected franchisee under the PMPA. In addition to the reasons which the Second Circuit cites for its determination (Pet. App. 6a-9a), there is absolutely nothing in the legislative history of the PMPA which is in any way inconsistent with the statutory definition of a "franchisee" as one who purchases motor fuel or who receives it on consignment. Nor is there any indication that Congress intended the Act to have a broadly remedial purpose extending beyond the carefully delineated categories set forth in the statutory definitions. If Congress had intended to cover entities with functions *similar* to those defined in the statute, it could

have so stated in the statute itself. The fact is that Congress did not.*

Checkrite's second argument is that the PMPA is a codification of an equitable principle (Pet. 17-20). Even if this questionable characterization of the legislative intent is accepted, the PMPA is quite plainly a statute in derogation of common law contract rights of the parties. Without the statute, motor fuel franchisors would be free to terminate franchises in any manner consistent with the parties' contract. The PMPA removes this right and imposes exclusive statutorily mandated grounds for franchise termination. The law is clear that a statute which abolishes common law rights must not be construed so as to alter the common law "further than its words import." *United States* v. *Mead*, 426 F.2d 118, 123 (9th Cir. 1970). *See e.g., Bauers* v. *Heisel*, 361 F.2d 581, 587 (3rd Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967); *American Sheet Metal, Inc.* v. *Em-Kay Engineering Co., Inc.*, 478 F. Supp. 809, 814 (E.D. Cal. 1979).

Checkrite's remaining argument in support of its Petition is that termination of its contract with Amoco will ultimately result in termination of the Amoco dealers for which Checkrite served as the broker. This argument is based upon Checkrite's claim that it controls the brand of fuel to be sold by the dealers and will be compelled for economic reasons to dictate a change in brands if its contract with Amoco is not renewed (Pet. 4, 7). In advancing this

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* Of course, Checkrite does not perform any function which is similar to purchasing gasoline or taking it on consignment.

Examination of the PMPA reveals that many persons involved in the business of marketing motor fuel are clearly excluded. Non-branded retailers and distributors are not protected since they have no trademark rights. 15 U.S.C. § 2801(4). Nor are employees who operate service stations for refiners, distributors or dealers, 15 U.S.C. § 2801(6)(B), carriers who transport motor fuel, terminal operators, pipeline companies, (*id.*), landlords of service stations or affiliates of retailers. 15 U.S.C. § 2801(7).

argument, Checkrite has made several misleading and inaccurate statements apparently calculated to create the impression that Amoco intended to terminate its agreements with the Checkrite dealers as well as its contract with Checkrite (*see* Pet. 4, 5, 6, 7).

In fact, as both the District Court and the Second Circuit expressly acknowledged (Pet. App. 21a; 9a), Amoco readily conceded from the outset of this litigation that the station operators are franchisees within the meaning of the PMPA who cannot be terminated absent compliance with the statutory termination provisions. This is so because they purchase and sell Amoco gasoline and are authorized to use the Amoco trademark. The Second Circuit was wholly justified in its conclusion that it was Checkrite and not Amoco which was threatening to interfere with the retail operators' status as Amoco dealers, and that Checkrite's acts to the dealers' detriment can hardly provide to Checkrite PMPA rights against Amoco.

It bears mention that Checkrite's Petition to this Court totally fails to address the fact that Checkrite has no authority to use the Amoco trademark. Both the term "franchise" and the term "franchisee" as defined in the PMPA require that there be authorization or permission to use a trademark. 28 U.S.C. § 2801(1), (4). (Resp. 2, *supra*). The requirement of trademark authorization is far from a technical one. It is consistent with the statutory intent to protect only those who acquire use of a motor fuel trademark or acquire the ability to authorize others to use it, *i.e.*, purchasers, resellers, and consignees of branded motor fuel.

Checkrite never pleaded or proved that it had any such authorization or permission, as indeed it did not under the Amoco-Checkrite agreement or otherwise. The Second Circuit expressly refrained from determining whether Check-

rite met this requirement for PMPA protection on grounds that the Court's holding made that determination unnecessary (Pet. App. 9a n.). Even if the Circuit Court somehow erred in its rejection of Checkrite's claim to coverage under the PMPA on grounds that it is neither a gasoline purchaser or consignee, that claim must fail because Checkrite had no rights to use Amoco's trademark.

One final point warrants brief mention. Petitioner strongly urged the Circuit Court to adopt the District Court's conclusion that Checkrite's control over its dealers made it in economic reality a "jobber" entitled to PMPA protection. The District Court based this conclusion in large part upon its determination that "Checkrite . . . has a captive group of station operators pledged to it by contract to sell whatever brand of motor fuel it designates." (Pet. App. 27a).

The Second Circuit correctly rejected this conclusion, noting that a typical "jobber" is a wholesaler or one who "buys and sells goods for others" (Pet. App. 8a). These activities fit squarely within the PMPA statutory definition of "franchisee" if trademark authorization is present. Checkrite, of course, neither purchased fuel nor took it on consignment, and has no distribution system or equipment, no trucks, storage capacity, sales force or credit with Amoco. It has absolutely nothing in common with a jobber.

This Court also should be aware that Checkrite totally failed to prove that it possesses the kind of economic control of its dealers which was the touchstone of the District Court's *sui generis* formula for PMPA eligibility. The Second Circuit did not address this failure of proof because it correctly rejected the ambiguous standard articulated by the lower court. The record shows that Checkrite failed to prove that there was even one retail station with an agree-

ment in effect giving Checkrite effective control over the brand of gasoline to be sold.

Thus, even applying the District Court's unprecedented interpretation of the PMPA, Checkrite's claim to coverage under that statute would fail as a matter of fact.

CONCLUSION

For each of the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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RICHARD R. LUTZ
NINA SHREVE
Of Counsel

APPENDIX

Amoco-Checkrite Agreement of 3/31/76

[EMBLEM]

AMOCO OIL COMPANY
EASTERN REGION
ONE NORTH CHARLES STREET
BALTIMORE, MARYLAND 21201
301-727-6700

May 25, 1976

File: REM-2
Subject: BROKER CONTRACT
CHECKRITE PETROLEUM CORP.

Checkrite Petroleum Corp.
59 Amherst Drive
N. Massapequa, New York 11758

Gentlemen:

We are enclosing herewith, for your records, one fully executed copy of Broker Contract between you and Amoco Oil Company, dated March 31, 1976.

Yours truly,

/s/ L. R. COMPTON
L. R. COMPTON
Real Estate Manager

DMH/g
Encl.

Amoco-Checkrite Agreement of 3/31/76

THIS AGREEMENT, made this 31st day of March, 1976, by and between AMOCO OIL COMPANY, a Maryland corporation, with offices at 1 N. Charles St., Baltimore, Maryland, hereinafter referred to as "AMOCO" and Checkrite Petroleum Corp., whose address is 59 Amherst Drive, N. Massapequa, New York 11758 hereinafter referred to as "BROKER".

WITNESSETH:

IN consideration of the covenants and conditions set forth herein, and other good and valuable consideration to each in hand paid, the receipt of which is hereby acknowledged, the parties hereto do hereby mutually agree as follows:

ACCOUNTS:

1. Broker represents to Amoco that there are fully equipped and going filling and automobile service stations at the locations leased to, or owned by, retail dealers in the operation of whose stations Broker does not participate as listed on the SCHEDULE A attached hereto; and that upon the terms and conditions hereinafter set forth, Broker will, without inducing the breach of any contract, cause the dealers now or hereafter operating the aforesaid service stations to execute and deliver to Amoco Dealer Sales Agreements on Amoco's standard form being offered to Amoco in the Metropolitan New York City area whereby such dealers contract to purchase from Amoco, petroleum products for resale at said service stations.

To add a service station to SCHEDULE A, it will be necessary that Broker submit to Amoco all necessary information concerning said account. This shall include a Proof of Contractual Right Letter. However, Amoco may, at its sole option, approve acceptance of such an account.

Amoco-Checkrite Agreement of 3/31/76

A service station may be deleted from SCHEDULE A at such time as it fails to conform to the covenants and conditions hereinafter set forth.

GASOLINE:

2. Amoco shall pay to Broker a commission in the amount of ONE AND NINE TENTHS CENTS (1.9¢) per gallon on each gallon of gasoline sold and delivered by Amoco to the retail dealers at locations identified in SCHEDULE A which is attached hereto and made a part hereof, as such may be modified by future written agreements of the parties hereto. Said commission shall be paid to Broker in monthly installments on or before the fifteenth (15th) of the calendar month next following the month in which said commissions are earned. Said commission shall accrue only in respect to Amoco Super Premium, Amoco Regular, and Amoco 91 sold and delivered to each dealer for distribution to retail customers at the specific service station to which delivery is made.

DURATION:

3. The period of this Agreement shall be from the 1st day of June, 1976, to the 30th day of May, 1981.

MOTOR OIL COMMISSIONS:

4. In addition to the commissions on gasoline stated above, Amoco will pay a commission of Ten Per Cent (10%) on dollar volume (exclusive of taxes) of motor oils delivered to such retail dealers by Amoco. This commission shall be paid on or before the fifteenth (15th) day of the month following payment for motor oil delivered.

Amoco-Checkrite Agreement of 3/31/76

WITHHOLD RIGHT:

5. Amoco shall have the right at its option, and in such manner as it shall determine, to apply such commission to the payment of any indebtedness of Broker to Amoco which shall then be due and payable and which shall not have been paid by Broker. Amoco shall not be required to give notice to Broker of its exercise of the foregoing right to apply commissions and Amoco's failure to exercise its said right shall not be construed to mean a waiver thereof.

VIOLATION OF LAW:

6. Should the payment by Amoco to Broker of said commissions be or become in violation of laws, orders, rules, regulations, or requirements of the Federal, State, County, Borough or Municipal Government or authority or administrative authority, then Amoco shall be under no further obligation to pay said commissions due Broker and this Agreement shall automatically terminate. Broker shall have the right to establish that said law, order, rule, regulation or requirement was invalid through appropriate action and if same is declared invalid, Amoco will then pay commissions from date upon which they were discontinued. In the event commissions are terminated pursuant to this paragraph, Broker shall have the option of requiring Amoco to supply gasoline to stations set forth in Schedule "A" for the balance of the term hereof, it being understood that no commissions will be paid thereon.

ASSIGNMENT:

7. This Agreement supersedes any and all prior agreements between Broker and Amoco, whether verbal or written, and no modification of this Agreement shall be effective

unless by written instrument properly executed by appropriate authorized representative of Amoco. It is further mutually agreed and understood that Broker can not transfer by Assignment or any other manner this Agreement or the rights contained thereunder, without written agreement of Amoco, and should the attempt be made to transfer without such written agreement, Amoco shall have the right to terminate this Agreement. Amoco, upon receiving written notification, will consent to the transfer of this Agreement or the rights contained therein to Harold Margolis and/or Frieda Margolis and/or any members of their immediate families or their respective trustees or to any corporation owned or controlled by one or more above named individuals and/or any members of their immediate families or their respective trustees.

DEALER CONTRACT:

8. If, without Broker's fault, a dealer at one of the service stations set forth in Schedule "A" discontinues operation thereof and the new dealer refuses to enter into such required contract to establish a contractual relationship between Amoco and Dealer, same shall not constitute a breach of this contract by Broker, however, Amoco, at its sole option, may refuse to deliver gasoline to said location and said location will be removed from Schedule "A" until such time as Broker secures necessary contract.

NEW DEALERS:

9. Amoco shall not be required to accept new dealers who have not attended Amoco's Dealer Development School and have not been approved by it as to credit reliability.

Amoco-Checkrite Agreement of 3/31/76

DEALER CHANGE:

10. Broker will give Amoco a minimum of ten (10) days written notice of its intent to change dealer at a service station set forth in Schedules attached hereto, and at the time of Dealer change, Broker will furnish Amoco a signed cancellation of the replaced Dealer's Sales Agreement, or any other proof of termination of the replaced Dealer's right to occupy the service station (e.g., cancellation of lease, copy of judgment in summary proceedings, affidavit of abandonment, etc.).

EQUIPMENT:

11. It is mutually agreed and understood that Amoco will furnish, in line with its normal policy, underground tanks and dispensing pumps with current station identification signs on those locations spelled out in Schedule "A". Should additional retail dealer locations be added by mutual consent to Schedule A, Amoco, upon approving the account in accordance with procedures set forth in Paragraph 1 hereof, shall furnish the aforesaid equipment. During any period of dealer change, it shall be the responsibility of Broker to insure that Amoco's equipment located at that specific facility is secured from vandalism and Broker shall be responsible for cost of replacement should vandalism occur.

OPTION:

12. If, prior to final year of the term of this contract, Broker shall sell or lease any or all of the property listed on Schedule "A", as modified in writing from time to time, owned by it or a corporation controlled by one or more of the principal officers of Broker, and the owner of said

property or properties shall either make or receive a bona fide offer to sell, purchase or lease which they or it desires to accept, said owner shall promptly notify Amoco in writing of such offer, setting forth the terms and conditions thereof, and for a period of sixty (60) days, Amoco shall have the preferential right to purchase or lease, as the case may be on the same terms and conditions as contained in said offer, it being understood and agreed that all or any of said properties shall continue to be subject to all terms, covenants and conditions of this Agreement until the end of its term. It is further understood that this preferential right as it pertains to leasing, shall not be construed as applying to leases entered into between Broker and dealers or operators of the service station locations. Nothing herein contained is intended to or shall preclude the transfer of any location owned, leased or otherwise controlled by Broker or by a corporation controlled by one or more of the principal officers of Broker to Harry Margolis, and/or Frieda Margolis and/or any members of their immediate families or to any corporation owned or controlled by one or more of the above named individuals and/or any members of their immediate families or their respective trustees, as set forth in Paragraph 7 hereof.

RENEGOTIATION:

13. It is further expressly understood and agreed that the intent of the parties hereto is that during the first six (6) months of the final year of this contract, Amoco and Broker will diligently negotiate with each other for an extension of same or a new contract, and that if such extension or new contract has not been executed prior to the expiration of said six (6) month period, Broker shall notify Amoco that it intends to begin negotiations with other companies.

However, this shall not preclude continued negotiations between the parties hereto, it being understood and agreed that the preferential option from Broker to Amoco as set forth in Paragraph 12 hereof shall cease to be in force and effect during the final six (6) months of the final year's term of this contract, unless such extension or new contract has been executed as aforesaid.

BROKER OPERATION:

14. In the event Broker, as an individual or through any subsidiary or controlled corporation, becomes the retail dealer at an account identified in Schedule "A", such station will automatically be eliminated from Schedule "A" and the terms of this Contract, and Amoco would then enter into a contractual relationship with Broker as a dealer, no further commissions would be paid on gasoline sold at said service station.

DEFAULT:

15. In the event of any breach of any covenant in this agreement by either party, the other party may give written notice of said breach and demand that it be cured within sixty (60) days. If the breach is not cured within said sixty (60) day period, the aggrieved party, at its option, may terminate this contract upon ten (10) days written notice. The foregoing shall be without prejudice to all other remedies of the aggrieved party, at law or in equity.

NOTICES:

16. All notices provided for herein shall be considered as properly given if delivered in writing personally or sent by Registered or Certified Mail. Notices to Amoco shall be

addressed to it as One North Charles Street, Baltimore, Maryland 21201. Notices to Broker shall be addressed to Broker at

17. It is mutually agreed between the parties that the Amoco Dealer Sales Agreements cited in Paragraph 1 hereof, shall contain the following clause:

> "This Agreement shall terminate automatically in the event that the Agreement of ..... 19....., between Amoco and Checkrite Petroleum Corp., as same may be extended or modified, is terminated for any reason."

at the time said contract is delivered to Amoco pursuant to the terms hereof.

18. This agreement shall not be modified or amended except in writing. No obligation, agreement or understanding shall be implied from any of the terms of this agreement, all obligations, agreements and understandings with respect to contractual terms being expressly set forth herein.

IN WITNESS WHEREOF, the parties hereto have caused this Contract to be executed the day and year first above written.

WITNESS: AMOCO OIL COMPANY

..... By .....
Regional Vice President

WITNESS: CHECKRITE PETROLEUM CORP.

..... By .....
HAROLD MARGOLIS

Amoco-Checkrite Agreement of 3/31/76

CHECKRITE PETROLEUM CORP.

SCHEDULE "A"

Account	*Address*
12766	Route 111, Hauppauge
12807	789 Portion Rd., Lake Ronkonkoma
12740	615 Union Ave., Westbury
12817	84 Waterside Rd., Northport
12922	783 Conklin St., Farmingdale
12818	146 W. Montauk Highway, Lindenhurst
12873	605 Sunrise Hwy., West Babylon
13030	65 W. Hoffman, Lindenhurst
13131	Straight Path, Wyandanch
12905	79 Suffolk Ave., Central Islip
12999	176 Grant Ave., Central Islip
12852	203 N. Main St., Freeport
13037	52 Lakeville Rd., Rockville Centre
13069	Main St., New Rochelle
12746	Middle Country Rd., Middle Island
13081	Middle Country Rd., Selden
12998	E. Marie and Park Ave., Hicksville

APPENDIX

Dealer Agreement

[EMBLEM]

AMOCO OIL COMPANY
DEALER AGREEMENT

S.S. No. 12807
Drop Point 14
District No. 43
Territory No. 05

THIS AGREEMENT, made this 18 day of June, 1979, between the Amoco Oil Company, a Maryland corporation, herewith called "Amoco" and Mike Rodriguez herewith called "Dealer":

WITNESSETH:

1. PRODUCTS AND QUANTITIES. Amoco agrees to sell and deliver to Dealer, and Dealer agrees to purchase and receive from Amoco, such quantities of the following-described products as will meet consumer demand for Amoco's products at the below-identified place of business, subject to the maximum annual quantities specified:

Product	*Maximum Annual Quantity*
Gasolines:	
AMOCO Super Premium (Lead-Free)	..... gallons
AMOCO Super Premium (Leaded)	..... gallons
AMOCO Regular (Leaded)	..... gallons
AMOCO (Lead-Free)	..... gallons
	as per FEA regulations

Dealer Agreement

Product	*Maximum Annual Quantity*
Diesel Fuels:	
Amoco Premier	..... gallons
Amoco	..... gallons
Other	..... gallons

Nothing herein contained shall preclude Dealer from selling competitive-brand liquid fuels at said place of business, provided there is no infringement of Amoco's trademarks. Amoco shall have exclusive discretion about the display or non-display of its trademarks on pole-signs, buildings and similar prominent places on the premises.

Deliveries shall be in relatively equal amounts, except for seasonal variations.

Amoco reserves the right to discontinue or change the grade and/or the trademark of any products.

2. Place of Business. Amoco shall be obligated to deliver said products only at Dealer's place of business situated at 789 Portion Rd., Lk. Ronkonkoma, New York 11779.

3. Prices. The price for gasoline and diesel fuels shall be Amoco's tank wagon price for each respective grade of said products in effect at the time of delivery in Amoco's pricing area in which the above-identified place of business is located.

4. Taxes. Dealer shall pay or reimburse Amoco for all gasoline taxes, diesel fuel excise taxes, sales taxes, use taxes, retailer's occupation taxes, inspection fees, gross

receipts taxes and similar imposts levied by federal, state or local authority upon the transactions covered hereby or measured in any manner by the sales prices hereunder.

5. TERMS. Payment shall be made in cash at time of delivery unless separate arrangements for credit are extended by Amoco to Dealer. Amoco reserves the right to withdraw any such credit at any time and demand cash payment on delivery. Failure of Dealer to make payment in cash or according to authorized credit terms shall entitle Amoco to suspend deliveries as long as Dealer's account remains overdue, without prejudice to any rights of Amoco to terminate this Agreement for such breach and/or other breach by Dealer, as hereinafter provided.

6. DELIVERIES. All products shall be delivered by Amoco to the above-identified place of business. Gasolines and diesel fuels shall be delivered in such minimum quantities as Amoco may from time to time determine, in its reasonable discretion, in order to make most efficient use of its delivery vehicles and its storage equipment upon the premises. Title of all products shall pass to the Dealer at the time of delivery, except as otherwise provided in applicable dealer price lists for particular products or in special written agreements between the parties.

7. FORCE MAJEURE. Amoco shall be excused from delay or non-performance hereunder if Amoco shall be unable to meet the demand for its products with supplies from Amoco's refineries or its other normal and usual sources, or if any other contingency of any nature whatsoever beyond Amoco's reasonable control shall

occur, such as, without limitation: Acts of God; fire; unavailability, failure, or delay of transportation; labor difficulties of any nature; and compliance with any governmental order, regulation, recommendation, request or allocation program (whether voluntary or involuntary). In any such contingency Amoco shall have the right to curtail deliveries or allocate its supply of product for sale among all of its customers in any manner which in its sole discretion is fair and reasonable under the circumstances, and Dealer shall not hold Amoco responsible in any manner for any losses or damages which Dealer may claim as a result of any such curtailment or allocation by Amoco. Amoco shall not be required to make-up any product not so delivered.

8. TRADEMARKS. All products purchased hereunder shall be resold under Amoco's applicable trademarks. Dealer shall display Amoco's identification sign, trademarks, and colors, all in accordance with Amoco's approved standards for same, which Amoco reserves the right to change at any time. Dealer shall not sell any products under Amoco's trademark except as authorized by Amoco and Dealer shall not mix, blend, dilute or contaminate said products. Amoco shall have the right at all times to inspect products in Dealer's possession to determine adherence to quality and trademark authorizations.

Upon the expiration or termination of this Agreement for any reason whatsoever, Dealer's authorization to use Amoco's trademarks shall expire, and Dealer shall return to Amoco all signs, decals and other promotional materials carrying Amoco's name and trademarks.

As used herein Amoco's trademarks include "QUAKER STATE", "ATLAS", and other marks of which Amoco is licensee.

9. LEAD-FREE PRODUCTS. Dealer shall comply at all times with Amoco's established procedures for controlling the quality of Amoco's branded lead-free products. Dealer shall indemnify Amoco against any penalty, loss, or liability of any nature whatsoever resulting from failure of dealer to maintain lead-free specifications of Amoco's lead-free products.

10. DURATION. The period of this Agreement shall be from June 18, 1979, to June 1, 1980 and from year to year thereafter unless terminated by either party at the end of the original term or any subsequent yearly period by giving the other party notice thereof at least thirty (30) days prior to such termination date.

11. TERMINATION. In the event of any breach of this Agreement by either party, the other party may give written notice of said breach and demand that it be cured within five (5) days. If the breach is not cured within said five (5) day period, the aggrieved party, at its option, may thereupon terminate this Agreement upon five (5) days' notice. The foregoing shall be without prejudice to all other remedies of the aggrieved party, at law or in equity. It is hereby agreed between the parties that specific performance of this Agreement shall be an appropriate remedy for any breach.

For the purposes of the above, death, disability or involvement in bankruptcy or receivership proceedings, shall be considered a breach of this Agreement.

12. ASSIGNMENT OF CONTRACT. This Agreement shall be binding upon, and inure to the benefit of, the parties

hereto and their respective heirs, representatives, successors and assigns, and it shall run with the land; provided, however, in the event Dealer transfers its interest hereunder or in the said land Amoco may terminate this Agreement, at its election, on ten (10) days' written notice.

13. NOTICES. All notices provided for herein shall be considered as properly given if delivered in writing personally or sent by Registered or Certified Mail. Notices to Amoco shall be addressed to it at: PO 507, Balt. Md. 21203. Notices to Dealer shall be addressed to Dealer at 33 Executive Rd., Selden, N.Y.

14. This Agreement cancels and supersedes all prior agreements and understandings between the parties hereto pertaining to matters covered herein and there are no other agreements, written or oral, between the parties pertaining to the subject matter hereof.

IN WITNESS WHEREOF the parties have caused this Agreement to be executed on the day and year aforesaid.

AMOCO OIL COMPANY

By .....

Dealer:

.....

.....

.....

Signed in presence of:

.....